91-1284

Supreme Court, U.S.
FILED
JAN 22 1992
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111,
Petitioner,
v.
COLORADO-UTE ELECTRIC ASSOCIATION, INC., and NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve a conflict among the Circuits regarding whether the National Labor Relations Board has the authority to define the scope of the duty to bargain about wages to require bargaining on the timing and amounts of individual merit pay increases?

2. Should this Court settle the fundamental question whether an employer may implement a final proposal upon impasse which seeks complete discretion over the timing and amounts of individual wage increases, a mandatory subject of bargaining?

LIST OF THE PARTIES

The parties to this proceeding are the National Labor Relations Board, Colorado-Ute Electric Association, Inc., and International Brotherhood of Electrical Workers, Local No. 111.*

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* Colorado-Ute Electric Association, Inc. is currently in Chapter 11 reorganization with a proposed plan of reorganization currently before the creditors. Under the proposed plan, Colorado-Ute's assets will be sold and the estate liquidated. The effective date of the plan is expected to be Spring, 1992.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF THE PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTES	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Facts	3
C. Procedural History	5
REASONS FOR GRANTING THE WRIT	7
I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE TENTH CIRCUIT ON THE ONE HAND AND OTHER COURTS OF APPEALS ON THE OTHER REGARDING THE SCOPE OF THE DUTY TO BARGAIN ABOUT WAGES	7
II. THE TENTH CIRCUIT'S DECISION RAISES FUNDAMENTAL QUESTIONS REGARDING THE SCOPE OF AN EMPLOYER'S RIGHT TO IMPLEMENT ITS PROPOSALS UPON IMPASSE WHICH HAVE NEVER BEEN BUT SHOULD BE SETTLED BY THIS COURT	12
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	29a
APPENDIX C	96a

TABLE OF AUTHORITIES

Cases Page

Bi-Rite Foods, Inc., 174 NLRB 59 (1964) 13
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10
Colorado-Ute Electric Association v. NLRB, 939 F.2d 1392 (10th Cir. 1991) 1
Ford Motor Company v. NLRB, 441 U.S. 448 (1979) 9, 10
Koenig Ironworks, 276 NLRB 811 (1985) 9
Litton Financial Printing v. NLRB, —— U.S. ——, 111 S.Ct. 2215, 138 LRRM 2441 (1991) 3, 10, 14, 15, 16
Local Union No. 47, IBEW v. NLRB, 927 F.2d 635 (1991) 8, 9
McClatchey Newspapers, 299 NLRB No. 156 (1990) 9
NLRB v. American National Insurance Co., 343 U.S. 395 (1952) 12, 14, 16
NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 107 LRRM 3120 (D.C. Cir. 1981) 8, 11
NLRB v. J.H. Allison & Co., 165 F.2d 766 (6th Cir. 1948) 8
NLRB v. Katz, 369 U.S. 736 (1962) 10, 11, 14, 15
Oneita Knitting Mills, Inc., 205 NLRB 500 (1973) .. 9, 11
State Bank of India, 273 NLRB 267 (1984) 9
Taft Broadcasting Co., 163 NLRB 475 (1967), *enf'd sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) 13
Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220 (D.C. Cir. 1990) 9

Statutes

National Labor Relations Act Sections:
8(a)(5) (29 U.S.C. § 158(a)(5)) 2, 6, 7, 9, 10
8(d) (29 U.S.C. § 158(d)) 7, 10
9(a) (29 U.S.C. § 159(a)) 2
10(f) (29 U.S.C. § 160(f)) 7
28 U.S.C. § 1254(1) 1

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PETITION FOR A WRIT OF CERTIORARI

Petitioner International Brotherhood of Electrical Workers, Local No. 111, hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Colorado-Ute Electrical Ass'n v. NLRB*, 939 F.2d 1392 (10th Cir. No. 89-9546, July 12, 1991).

OPINIONS BELOW

The Tenth Circuit opinion, reproduced as Appendix A, is reported at 939 F.2d 1392 (1991). The opinion of the National Labor Relations Board, reproduced as Appendix B, is reported at 295 NLRB No. 67, 131 LRRM 1458 (1989).

JURISDICTION

The Tenth Circuit entered its opinion on July 12, 1991. A timely Petition for Rehearing with suggestion for Rehearing En Banc filed by the International Brotherhood of Electrical Workers, Local No. 111's ("the union") was denied on September 24, 1991. On December 16, 1991, Justice White granted the Union's Application for an Extension of Time For Filing a Petition for a Writ of Certiorari to January 22, 1992. This Court has jurisdiction to review the Tenth Circuit's opinion and judgment under 28 U.S.C. 1254(1).

PERTINENT STATUTES

Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5), provides as follows:

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(a) of the NLRA, 29 U.S.C. § 159(a), provides as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining with respect to . . . wages. . . .

STATEMENT OF THE CASE

A. Introduction

In this case, the Tenth Circuit reversed the National Labor Relations Board's ("NLRB" or "the Board") decision that an employer may not refuse to bargain with its employees' union about the amount of wages paid individual employees, by making unilateral changes in wages, simply because the employer bargains to an im-

passe upon a proposal that it be permitted to do so. The Tenth Circuit's decision turned both upon disagreement with the Board concerning the scope of the statutory duty to bargain collectively about wages, and upon disapproval of the Board's conclusions concerning the role of the unilateral change doctrine generally in protecting the right of collective bargaining.

As we show below, the Tenth Circuit's conclusions regarding the nature of the duty to bargain about wages is in conflict with the views not only of the NLRB but of the Sixth and District of Columbia Circuits as well. And the Tenth Circuit's reversal of that aspect of the Board's decision holding that, as a general matter, a bargaining impasse does not privilege unilateral changes where a bargaining party seeks waiver of a statutory right is in tension with a decision of this Court just last term, *Litton Financial Printing v. NLRB*, —— U.S. ——, 111 S.Ct. 2215, 2222 (1991).

B. Facts

Colorado-Ute Electric Association ("the company" or "the employer") is in the business of generating, transmitting, purchasing and selling electrical energy. (Tr. 220). The company had a collective bargaining agreement covering clerical employees which extended from September 11, 1983 to September 13, 1986. (Jt. Ex. 1). That contract contained a wage reopener provision for the contract years beginning in September, 1984 and 1985 which preserved for both parties the right to "negotiate wages" at those times. (Jt. Ex. 1, pp. 30-31, Art. 32 (1)(d)).

The parties began negotiations under the first of those wage reopener provisions on July 31, 1984. (Jt. Exs. 49 and 50). Throughout the period between July 31, 1984 and September 12, 1984, the company insisted upon proposals which provided for merit increases to all employees, determined only by management and not subject to

the contractual grievance procedures. As stated by the company president, Girts Krumins, "I would basically decide what the increase would be." (Tr. 230).

The union was willing to agree to merit increases, but only in combination with an across-the-board increase granted to all employees. (Pet. App. 33a; Tr. 47, 54).

At the tenth negotiating session on September 5, 1984, the company submitted its "final company offer." (Jt. Ex. 11). That final offer, consistent with the company's position throughout, was as follows:

> The merit increase programs will provide employees the opportunity of receiving additional increases based on their individual performance and contribution on their job. The amount and frequency of such merit increase will be determined by the Division head and President and will not be subject to the grievance procedure. (Jt. Ex. 11).

In a letter addressed to the union negotiator dated September 12, 1984 (Jt. Ex. 13), the company announced that it would implement its September 5 proposal on September 23, 1984. On that date, the company granted merit increases of varying amounts to forty-four of the seventy-two bargaining unit employees; the increases were based entirely upon the discretion of management, and the union was not consulted regarding these merit increases at any time. (Pet. App. 31a, 34a.)

At the next bargaining session, on September 27, 1984, the company hand delivered to the union negotiator, Robert Mason, a letter detailing the results of the company's implementation. (See Jt. Ex. 21). Mason asked if the hand delivered document was a proposal. John Gibson, the company negotiator responded, "No, it was not a proposal. It was the results of what we had implemented." (Tr. 318). Moreover, when Mason then attempted to negotiate in behalf of one bargaining unit member, Tammy Bensely, he was told that the union had no recourse; while Ms. Bensely *herself* could go to the

company president, the answer to the question whether the *union* could talk to the company president in behalf of an aggrieved employee was "No." (Tr. 88; Pet. App. 32a; *see also* Tr. at 85, 160-163, 244; Pet. App. 30a, n.1) employer's President met personally with employees, without the union, to discuss dissatisfaction with merit increases, and in one case made a change in response to the employees' appeal).

By October 30, 1984, the company had reviewed all of the employees in the bargaining unit for merit increases (Jt. Ex. 28), and by December 5, 1984, all employees had received merit increases. (Tr. 113). In all cases, the employer initially determined unilaterally the timing and amount of increases, and applied the subjective criteria of job performance and contribution on the job in determining the merit increases. (Tr. 250). In no case did the company offer to consult with the union regarding the timing or amount of merit increases granted to any employee. Indeed, when asked specifically if the company would negotiate individual wages as part of implementation, the company negotiator answered that the merit increases were not negotiable. (Pet. App. 32a; Jt. Ex. 49, Oct. 3, 1984 negotiating notes at p. 2; Jt. Ex. 50, Oct. 3, 1984 negotiating notes at p. 1).

After impasse, bargaining continued, but the Company never abandoned its insistence upon "management perogative to determine the amount and timing of merit increases and to permit individual questions or complaints to be directed to the Company president." Pet. App. 33a. Bargaining closed after March 27, 1985, with the parties having reached no agreement. *Id.* at 33a.

C. Procedural History

In September, 1984, and January, 1985, the union filed unfair labor practice charges against the employer, upon the basis of which the NLRB General Counsel issued a

consolidated complaint. (Pet. App. 47a.) The complaint alleged, among other things, that the employer had failed to bargain in good faith with the union by unilaterally implementing the terms of its merit wage offer. (*Id*).

On June 15, 1989, the Board agreed with this allegation, holding that Colorado-Ute violated Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) when, under the guise of implementing its final offer, it illegally violated the union's bargaining rights by granting merit increases without consulting with the union about their timing and amounts. (Pet. App. 29a.)

Specifically, the Board held, first, that where a merit increase program giving the employer substantial discretion is in place, "[t]he implementation of a merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted." Pet. App. 34a. Because this is so, reasoned the Board, a proposal to implement a merit pay proposal unilaterally and without permitting challenges through the grievance procedure involves the waiver of a the statutory right to bargain collectively, and cannot be implemented, even after a bargaining impasse, without union consent:

> Here, despite earnest effort, the Respondent was unable to secure the Union's waiver of its right to bargain over the merit increases' timing and amounts. . . . The Respondent was free to insist to impasse as a condition to agreement on any wage terms that the Union agree to waive the statutory rights at issue here. But the Respondent's freedom to pursue this end and to exert this bargaining pressure to obtain the end does not carry with it a right, once having failed and reached impasse, to proceed with implementation of the final offer as if the Respondent had successfully secured the Union's waiver. . . . Where the employer proposal seeks the union's waiver of

> statutory rights . . . impasse is no substitute for consent. [Pet. App. 35a, 36a, 37a.]

Colorado-Ute filed a petition for review of the Board's decision under 29 U.S.C. § 160(f), the NLRB filed a cross-application for enforcement of the order, and the union timely intervened. On July 12, 1991, the Tenth Circuit reversed the Board.

The Tenth Circuit held, first, that the statutory right to bargain does not, as the Board had determined, encompass the right to bargain about *both* the general question whether a merit system should govern *and* the specific timing and amount of individual merit increases. Pet. App. 18a-19a. Rather, the court of appeals maintained that "the Union's statutory right to bargain was vindicated by hard bargaining over merit wage proposals" alone (Pet. App. 19a), and that therefore "the final offer was [not] a 'waiver' of the Union's statutory right to bargain.'" (Pet. App. 26a.) Second, the Tenth Circuit decided, more generally, that as long as an employer bargains good faith at the bargaining table, it can implement a mandatory subject of bargaining upon a bargaining impasse. (Pet. App. 26a.)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE TENTH CIRCUIT ON THE ONE HAND AND OTHER COURTS OF APPEALS ON THE OTHER REGARDING THE SCOPE OF THE DUTY TO BARGAIN ABOUT WAGES.

(a) The National Labor Relations Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representative of its employees . . . with respect to wages." NLRA Sections 8(a)(5) and 8(d), 29 U.S.C. § 158(a)(5) and (d). Prior to the Tenth Circuit decision in this case, the courts and the National Labor Relations Board universally agreed that

the duty to bargain over wages is twofold: First, the parties must bargain regarding the system for determining wages, *viz.*, whether the wages paid to the employees are set through a fixed and objective formula or through the exercise of some employer discetion in paying individual employees. Second, if the system includes a measure of employer discretion, the union must be consulted regarding the setting of individual wage rates.

As early as 1948, the Sixth Circuit so held, stating:

> We think the logical deduction to be drawn from the opinions of the Supreme Court is that by virtue of the National Labor Relations Act the obligation of the employer to bargain collectively with representatives of its employees with respect to wages, hours, and working conditions, includes the duty to bargain with such representatives concerning individual merit wage increases. [*NLRB v. J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948).]

The District of Columbia Circuit, in *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (DC Cir. 1981), likewise recognized that the employer is obligated to bargain with the union regarding any discretionary element used to determine the wages paid to individual employees. That court stated:

> . . . the wage increases in question here contained both automatic and discretionary elements. . . .
>
> The company could not unilaterally determine the size of the increase that each employee would receive; it would be required to bargain over this discretionary element.

See also Local Union No. 47, IBEW v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991) (referring to the union's "right to be consulted about the timing and amount of individual merit determinations").

Consistent with this twofold approach to the duty to bargain, the D.C. Circuit has expressly recognized that, contrary to the Tenth Circuit's holding, a collective bargaining agreement proposal that seeks broad employer discretion while eliminating the union's right to be consulted on a mandatory subject of bargaining does propose a prospective waiver of statutory bargaining rights. *See Local Union No. 47, IBEW*, 927 F.2d at 640 (through the collective bargaining process, a union can either negotiate for a fixed contract or "waive the employees' statutory right to bargain over a term or condition of employment"); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1221 (D.C. Cir. 1990) (a bargaining proposal that "reserves a mandatory issue for future consideration without the participation of the union" necessarily "involve[s] a waiver of the union's statutory bargaining rights.")

As these decisions recognize, the National Labor Relations Board has uniformly interpreted the duty to bargain about wages so as to recognize the union's right to bargain about the implementation of an otherwise proper merit pay program involving employer discretion; *viz.*, about the determination of the amount or timing of individual merit pay increases. *Oneita Knitting Mills, Inc.*, 205 NLRB 500, n.1 (1973); *Koenig Ironworks*, 276 NLRB 811, 814 (1985); *State Bank of India*, 273 NLRB 267, n.5 (1984).[1]

In these decisions, the Board exercised its "primary responsibility of marking out the scope of . . . the statutory duty to bargain." *Ford Motor Company v. NLRB*, 441 U.S. 448, 496 (1979). Because the Board's role in delineating the scope of the bargaining obligation is "at the heart of the Board's function," the Board's decisions in this area particularly if "reasonably defensible . . . should not be rejected merely because the Court's may

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[1] The Board has most recently reaffirmed this position in *McClatchey Newspapers*, 299 NLRB No. 156 (1990).

prefer another view." *Ford Motor Company*, 441 U.S. at 496. See also *Litton Financial Printing v. NLRB*, —— U.S. ——, 111 S.Ct. 2215, 2222 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The application of the duty to bargain to require negotiations about the discretionary merit wage paid each individual is eminently reasonable. From each individual employee's point of view the relevant "wages" are those he or she actually receives. Under a discretionary merit pay program, therefore, each employee has a strong interest in insuring the fairness of his or her individual wage. Furthermore, the statute itself expresses no limitations on the duty to bargain about wages, leaving the Board the prerogative to imply none. Finally, as is shown in Part II of this Petition, the Board's interpretation is an integral part of its overall construction of the statutory bargaining obligation. Indeed, these holdings are in accord with this Court's jurisprudence as stated most fully in *NLRB v. Katz*, 369 U.S. 736, 744 (1962) (individual discretionary merit increases during bargaining violate § 8(a)(5) even though the employer had a long-standing policy of granting periodic merit increases).

(b) In the face of this exercise of the Board's unquestioned authority to define the scope of the duty to bargain about wages with concurrence by at least two Courts of Appeals, the Tenth Circuit rejected the Board's conclusion in this case that the Act required the company to bargain about the timing and amount of individual merit increases. The Tenth Circuit stated:

> The Board . . . contends that the duty to bargain imposed by § 8(a)(5) and 8(d) encompasses an obligation to 'bargain about particular economic terms.' . . . We disagree with the Board's contention and conclude that, given the bargaining history in this case, the union's statutory right to bargain was vindicated by hard bargaining over merit wage proposals. [Pet. App. 21a.]

To support its conclusion, the Tenth Circuit endeavored to distinguish the cases holding that there is a duty to bargain about the timing and amount of individual wage increases when a merit system is in place on the basis that in those cases, no impasse upon the question whether to have a discretionary system was ever reached. Pet. App. 21a, 22a. That circumstance, however, whether or not pertinent to the ultimate issue of the propriety of unilateral implementation of the employer's proposal that the union *waive* half of its statutory bargaining rights over wages, is entirely irrelevant to the *threshold* issue of the substantive reach of an employer's statutory duty to bargain absent a waiver or other applicable exception to the bargaining obligation.

In *Blevins Popcorn*, for example, the employer had a preexisting merit pay system, and was entitled, under established NLRA principles, to continue that general system in place *without* further bargaining. *See NLRB v. Katz*, *supra*, 369 U.S. at 746. Consequently, no issue arose in that case as to an obligation to bargain with regard to that basic system, and the only question was whether, with the basic system properly in place, the employer could proceed to exercise its discretion regarding particular wage payments without union consultation. The D.C. Circuit, in accord with *NLRB v. Katz*, *supra* and Board law, decided that the nature of the duty to bargain about wages precludes such unilateral action.

Here, there was no preexisting discretionary merit pay system, so the employer was not entitled to implement a system of individual merit pay increases at all without so proposing to the union and bargaining to an impasse. Once it did so, however, the employer was in precisely the same position, with regard to the general statutory bargaining obligation, as the employers in *Blevins Popcorn*, *Oneita Knitting*, and the other cases cited above: Although the employer was then entitled to implement the "automatic" aspects of the plan (*Blevins Popcorn*, 659 F.2d at 1189)—*viz.*, that wage increases

would be periodically determined according to merit—the bargaining process had not addressed at all the implementation of the discretionary aspects of that plan.

There is no basis, and the Tenth Circuit opinion provides none other than repeated *ipse dixits*, for concluding that an employer who through a bargaining impasse has succeeded in placing himself in the same position as an employer who has a merit pay system in place thereby escapes the obligation imposed on the latter employer to bargain about the exercise of discretion under an otherwise lawful merit pay system.

The Tenth Circuit's holding, therefore, creates a fundamental conflict between that court on the one hand and the Sixth Circuit, the D.C. Circuit, and the National Labor Relations Board on the other, regarding a fundamental question in federal labor law: the meaning of the obligation to bargain about wages. The resolution of this question will determine whether the employees who have exercised the right to choose union representation will have such representation on an issue of supreme importance to them: the amount of money they actually bring home in their pay check.

II. THE TENTH CIRCUIT'S DECISION RAISES FUNDAMENTAL QUESTIONS REGARDING THE SCOPE OF AN EMPLOYER'S RIGHT TO IMPLEMENT ITS PROPOSALS UPON IMPASSE WHICH HAVE NEVER BEEN BUT SHOULD BE SETTLED BY THIS COURT.

At bottom, the Tenth Circuit based its conclusion that the scope of the duty to bargain does not include the union's right to negotiate the timing and amount of individual merit increases upon two general principles of labor law. First, the Tenth Circuit relied upon this Court's opinion in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952) for the proposition that an employer has the right to bargain for a provision in a collective bargaining agreement according the employer

discretion with respect to the administration of wages, hours, and conditions of employment under that agreement. Second, that court relied upon the general principle of labor law that an employer has the right to implement its mandatory bargaining proposals after reaching impasse with the union. (While the latter principle has generally been stated by the Board and the lower Courts, see, e.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enf'd sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) and *Bi-Rite Foods, Inc.*, 174 NLRB 59 (1964), its full parameters have never been explored by this Court.)

The Tenth Circuit regarded these two principles as absolutes and concluded that since Colorado-Ute had the right to bargain for discretion in the administration of a merit pay program, and since the employer bargained to impasse with the union for that discretionary program, it follows that the employer had the right to implement that discretion.[2]

In fact, neither of the two principles relied upon by the Tenth Circuit supports its ultimate conclusion, and the Tenth Circuit's misstatement of the law in this regard warrants this Court's review.

First, the Board was entitled, given its central role in explicating national labor policy, to conclude that exceptions to the "implementation on impasse" rule must obtain for proposals that, while mandatory subjects of bargaining, are for other statutory reasons valid terms

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[2] While the Tenth Circuit acknowledged the cases cited in Part I of the Petition holding that the scope of the duty to bargain includes the union's right to be consulted regarding the timing and amount of merit pay increases, the court below held that this right somehow evaporates when the employer bargains to impasse over a separate aspect of the wage proposal, the structure of the merit pay plan. The Tenth Circuit's opinion does not grapple with the question how the employer can fulfill its duty to bargain about both the general outline of the plan *and* particular wages by reaching impasse with the union over only the *first* of those subjects.

and conditions of employment only if there is agreement on both sides. And second, *American National Insurance* is in no way inconsistent with this conclusion, since that decision establishes only that an employer can bargain to an impasse for discretion regarding mandatory subjects, and does *not* deal with whether the employer may implement that discretion once an impasse is reached.

(a) To demonstrate that the Board's decision in this case comports with a coherent overall national labor policy and is consistent with *American National Insurance*, *supra*, we must begin with an examination of the "unilateral change" doctrine first enunciated by this Court in *NLRB v. Katz*, *supra*. Indeed, in this case, the Board alleged an unfair labor practice precisely on the basis that before bargaining with the union about individual timing and amounts of merit increases the employer *unilaterally changed* the employees' wages in violation of the principles set down in *Katz*.

This Court recently explicated *Katz* and further explored the nature of the unilateral change doctrine in *Litton Financial Printing v. NLRB*, *supra*. As this Court explained in that case:

> The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it affects a unilateral change of an existing term or condition of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. [111 S. Ct. at 2221].

Litton Financial Printing, however, also explains that some terms and conditions of employment that *are* mandatory subjects of bargaining do *not* survive expiration of an agreement under the unilateral change doctrine because of statutory policy. For example, union security and dues checkoff provisions do not survive the expiration of a contract because the National Labor Relations Act conditions such terms upon an express agreement of the parties. Also, no-strike clauses do not survive expiration of an agreement because the right to strike is protected by statute, and that right cannot be relinquished without the express consent of the union. Furthermore, *Litton Financial Printing* itself reaffirms that arbitration clauses, while mandatory subjects of bargaining, are exclusive creatures of contract, since arbitration is a "voluntary surrender of the rights of final decision which Congress reserved to the parties." *Litton Financial Printing*, 111 S.Ct. at 2222.

Likewise, the identical exceptions must apply to the rule that an employer can implement final proposals after bargaining to impasse about them: If some provisions do not survive the expiration of a contract because the right in question is contract dependent, those provisions cannot be revived by one party's bargaining to impasse, a situation, in which, by definition, the *mutual consent necessary for a contract* has not been achieved.

As was pointed out by the Board in the present case, for example, the most obvious example of a contract dependent provision is a no-strike clause. Such a proposal is a mandatory subject of bargaining upon which an employer may insist to impasse. However, after reaching impasse an employer is no more free to implement its proposal by firing employees or taking other actions violative of the employees' right to strike than it was before impasse, whether or not there was a no-strike clause in the prior agreement. Pet. App. 37a. Similarly, neither party would be able to impose a union security

clause, a checkoff provision, or an arbitration provision before *or* after impasse, because all such clauses are contract dependent.[3]

Thus, the identity between mandatory subjects of bargaining and the right to implement upon impasse, assumed by the Tenth Circuit on the basis of *American National Insurance*, *supra*, simply does not exist. The Tenth Circuit's analysis, proceeding from that premise, is therefore entirely unhelpful in determining whether the employer here could implement its bargaining proposal for complete discretion over the timing and amounts of merit pay increases: One cannot conclude that the employer could implement its proposal merely by virtue of the fact that the proposal dealt with a mandatory subject of bargaining and that the employer was therefore entitled to bargain to impasse on the proposal.

Rather, the outcome of this case in truth turns upon whether the Board was entitled to view the employer's merit pay proposal as contract dependent, like union security, arbitration, and no strike clauses, and, therefore, as a proposal that cannot be implemented on an impasse. As is demonstrated in Part I of this Petition, the Board was so entitled, because, just as the arbitration clause in *Litton* involved a waiver of the employer's statutory rights, so the proposal here sought a prospective waiver of the union's right to bargain about certain aspects of wages.

Accordingly, the employer has no inherent right in the overall labor relations scheme to implement upon impasse proposals that are mandatory subjects of bargaining gen-

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[3] For example, there is no suggestion in *Litton* that the union in that case could have insisted upon arbitration of the self-same dispute involved in that case if it simply had proposed to arbitrate that dispute and bargained to impasse upon that proposal. Rather, the whole point of the discussion in *Litton* is that neither party can be compelled to arbitrate any dispute unless *both* parties agree to do so.

erally. And since the Act requires the employer to *bargain* with the union about wages, the employer can propose and bargain to impasse upon the merit pay proposal, but cannot by reaching an impasse avoid its further obligation to bargain about particular merit increases. The merit pay proposal clearly entails a waiver of the union's right to bargain about wages, and that waiver cannot be obtained without the union's consent.[4] Therefore, an employer who has bargained to an impasse on a discretionary merit pay proposal can proceed to implement the general system of making individual wage increase based on merit, but can only implement individual increases if the union has an opportunity to bargain concerning each such increase.

Since the Tenth Circuit's decision is based upon a mistaken application of the "implementation upon impasse" rule, and since this Court has never defined the scope of that fundamental labor law rule, *certiorari* should be granted here. The misapplication of that rule to *all* mandatory subjects of bargaining, including such "contract dependent" subjects as no-strike clauses, union security provisions, and arbitration provisions, would have wide reaching and adverse effects on the entire collective bargaining system.

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[4] Thus, the Tenth Circuit's view that by preventing the employer from implementing its proposal upon impasse the Board was dictating the substantive terms of a collective bargaining agreement is wrong. The Board imposed no such agreement, and no such agreement exists between the parties. On the contrary, the Board merely blocked the employer's attempt to escape its obligation to bargain with the union about individual wages.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-9545

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 111,
Intervenor.

NATIONAL ASSOCIATION OF MANUFACTURERS,
Amicus Curiae.

Appeal from the National Labor Relations Board

[Filed Jul. 12, 1991]

Gerard C. Smetana, of Abramson & Fox, Chicago, Illinois, and Michael E. Avakian, Center on National Labor Policy, Inc., North Springfield, Virginia (James H. Delman, Asst. General Counsel, Colorado-Ute Electric Ass'n,

Montrose, Colorado, with them on the briefs), for Petitioner-Appellant.

Robert F. Mace, Attorney, National Labor Relations Board (Barbara A. Atkin, Supervisory Attorney; Jerry M. Hunter, General Counsel; Robert E. Allen, Associate General Counsel; and Aileen A. Armstrong, Deputy Associate General Counsel, with him on the brief), Washington, D.C., for Respondent-Appellee.

Marsha B. Berzon, San Francisco, California (Joseph M. Goldhammer, of Brauer Buescher, Valentine, Goldhammer & Kelman, P.C., Denver, Colorado; and James B. Coppess, Washington, D.C., with her on the brief), for Intervenor-Appellee.

Avrum M. Goldberg, P.C. and Patricia A. Casey, of Akin, Gump, Strauss, Hauer & Feld, Washington, D.C.; and Jan S. Amundson, General Counsel and Quentin Riegel, Deputy General Counsel, National Association of Manufacturers, Washington, D.C., filed a brief on behalf of National Association of Manufacturers, as Amicus Curiae.

Before SEYMOUR, TACHA, and BRORBY, Circuit Judges.

SEYMOUR, Circuit Judge.

The National Labor Relations Board (NLRB) held that Colorado-Ute Electric Association (Colorado-Ute or Company) violated section 8(a)(5) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a) (1988), by unilaterally implementing a merit wage plan after impasse. Colorado-Ute appeals the Board's decision and the NLRB cross-appeals for enforcement of the order. We reverse the decision of the NLRB and decline to enforce it.

I.

Colorado-Ute is an incorporated cooperative association which generates and sells electrical energy to member associations throughout Colorado, employing approximately seventy-two office and clerical workers. The International Brotherhood of Electrical Workers, Local No. 111 (Union) is the certified bargaining representative of Colorado-Ute's office, clerical, and plant workers.

The collective bargaining agreement relevant to this dispute, negotiated by the Union and Colorado-Ute, was effective from September 11, 1983 to September 13, 1986. Rec., vol. II, jt. ex. 1, at 29. It provided for hourly wage rates that increased according to an employee's tenure. An employee would receive a raise after a six-month term of employment and yearly thereafter. *Id.* at app. B. These automatic increases, or "progression steps," would continue until an employee's sixth year of employment. The collective bargaining agreement did not provide wage increases for the employees who had served more than six years with Colorado-Ute. Such employees, therefore, would "top out" of the pay scale at the seventh progressive step. *Id.*

Article 32(d) of the collective bargaining agreement provided that during its term "either party may elect to negotiate wages in [the agreement] by giving written notice to the other party." *Id.* at 30-31. On June 8, 1984, the Union notified the Company in writing that it wished to open the wage progressions set out in Appendix B of the collective bargaining agreement to discuss a "lucrative wage increase for all classifications." Rec., vol. II, jt. ex. 2. Twenty-three bargaining sessions ensued, beginning on July 31, 1984 and terminating on March 27, 1985.

Marlene Joens and Don Shaputis, assistant and senior assistant business managers of the Union, and various unit employees including Joan Deskin Hiss, formerly a

steward at Colorado-Ute's Craig facility, bargained on behalf of the Union. John Gibson, manager of personnel and labor relations, assisted by other management representatives, negotiated on behalf of Colorado-Ute. The bargaining history between the Union and Colorado-Ute is detailed below.[1]

July 31, 1984

The Union began the first bargaining session by asking for a 9% across-the-board (ATB) wage increase for all job classifications in all pay grades. In the course of the first negotiating session, Gibson indicated that a wage increase was unacceptable because: Colorado-Ute already paid higher wage rates than other businesses in the area and consequently was under pressure not to grant further increases; the progression steps in the Union's contract already provided for guaranteed increases; Colorado-Ute wanted to develop a system of wage increases that would provide for those employees already at the maximum progression step; and there was "only so much money in the pot to spend." Rec., vol. IV, doc. 1, at 5; rec., vol. I, at 276-77. Gibson proposed combining a single wage rate for each job classification with a merit increase. The Union rejected the proposal. The Union stated that the ATB wage increase was negotiable and further suggested that the parties could agree to freeze the current first and second 6-month hire-in rates. The meeting ended with no agreements having been made.

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[1] As noted by the Administrative Law Judge (ALJ), there is little factual dispute concerning the bargaining events as evidenced by the parties' bargaining notes submitted into the record. *See* rec., vol. IV, doc. 1, at 5 (ALJ decision); rec., vol. II, jt. exs. 49 & 50 (bargaining notes).

August 14, 1984

Gibson continued to insist upon a merit increase program while the Union continued to propose an ATB wage increase. When the Union asked how the Company planned to implement its merit wage system without favoritism, Gibson did not respond. He replied only that the supervisor's opinion would be the basis for merit increases. The Union pushed for further details by emphasizing that a guarantee of fairness and no disparate treatment was required.

The Union made several of its own wage proposals. It suggested that the Company use "double jumping" to reward employees; that is, reward superior employees by promoting them through the progression steps at an accelerated rate as permitted by the current collective bargaining agreement. The Union next proposed either tying an ATB wage increase to the Company's profit margin or reducing the ATB wage increase to 7%. In conjunction with the 7% proposal, the Union also indicated that it would be willing to freeze hire-in rates. At various times the Union and the Company discussed the progression steps built into the collective bargaining agreement and the fact that they had been negotiated into the contract in previous years. The Company rejected the Union's proposals stating that they were too high and flawed because they were not based on merit.

August 15, 1984

The Union again proposed a 7% ATB increase with a hire-in wage freeze. The Company rejected this proposal and suggested that the parties agree to eliminate progression steps and implement a merit system. The Union indicated that it was opposed to merit increases in general but asked the Company to provide a specific proposal on wage terms.

After a lunch break, the Company handed out a proposal dated August 15. Rec., vol. II, Company Proposal, Aug. 15, 1984. The Company proposed to eliminate the progression steps in the current contract by establishing a fixed minimum, mid-point, and maximum wage rate for each job classification. The proposed minimum rate equalled the current second step rate (*i.e.*, second six-month rate) for each classification. The proposed maximum rate was equal to the top step of each classification with an added increase of 3.9%.[2] Additionally, all employees would receive 60% of their next step increase effective September 9, 1984. Thus, the Company's proposal specifically guaranteed, at a minimum, a higher hire-in rate and wage increase, effective September 9, 1984. It also increased the maximum wage rate employees could receive by 3.9%. In response to the Union's concerns that the merit system would be underfunded, the Company also offered to negotiate a "merit kitty," an amount set aside to be used for wage increases.

The proposal contained over a page of "Merit Increase Performance Guidelines" listing factors by which employees would be evaluated. The record reflects that Gibson stated these factors were only guidelines and that there would be no written merit evaluations. The proposal outlined non-binding guidelines establishing specific ranges for increases that corresponded to whether an employee had been evaluated "more than satisfactory", "satisfactory", and "less than satisfactory". The proposal outlined a schedule for frequency and amount and these were similarly non-binding. Gibson also stated that the frequency and amount of the increases, which were ultimately solely at the discretion of the employer, would also not be subject to the grievance procedure.

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[2] The materials control clerk, the work order clerk, and the inventory control clerk were excluded from the proposed increase and were frozen at the current rate in the existing contract.

August 16, 1984

The bargaining session began with the Union rejecting the Company's August 15 wage proposal. The Union believed increases might not be granted under Colorado-Ute's proposal because there was no money budgeted for increases and because personality conflicts would arise between employees and supervisors who were determining wage merit increases. The Union also questioned to what extent wage increases were guaranteed beyond employees receiving 60% of their next step increase. The Union was specifically concerned with twenty-two of their employees who would be in the top step of their wage progression and would therefore be "at the mercy" of the proposed merit system for further wage increases. Rec., vol. I, at 43. It also feared that the proposal would hinder the grievance system because employees would be hesitant to file complaints against their supervisors who, under the proposed wage system, would be granting the increase. The Union also was concerned that each individual employee would ultimately end up negotiating his or her own wage increase.

Although Colorado-Ute's most recent proposal anticipated some specific terms, the Union continued to press for more specific details concerning the Company's proposal. The Union then offered its own proposal: a 6% ATB increase for all job classifications with a freeze on all hire-in rates at the current level. The Union added that if the Company chose to, it could evaluate the employee in six months, and those that were deserving could be granted an additional 3% increase.

The Company rejected the Union's proposal primarily because it attempted to lock in a set amount for a wage increase. In response to the Union's concerns, however, Gibson proposed a fixed amount for merit increases. Gibson specifically proposed that the Company take the dollar amount already committed to the merit increases

for approximately the next year and distribute it among the employees by giving some to them immediately and distributing the rest among the employees through a merit system. This proposal would have had the effect of fixing the total amount of money to be spent on wages. No agreement was reached by the end of the negotiating session.

August 20, 1984

The Company formally rejected the Union's proposal of a 6% ATB increase combined with the 3% merit increase. The Company also withdrew its previous suggestion to eliminate step increases entirely and made a new proposal: to leave the step increase intact and permit Colorado-Ute to pay merit increases in addition to the progression steps. The Company explained it favored this system because all employees were eligible for a merit increase in addition to their guaranteed progression step wage rate. It also stated no merit kitty would be established to implement this plan.

The Union proposed that the Company eliminate unproductive employees and then grant an ATB increase to remaining employees instead. The Union, however, opposed basing wages on merit because its employees preferred a guaranteed wage rate. The company reiterated that it was not interested in putting a number on increases. The Company suggested another bargaining alternative was to leave wages unchanged, and the meeting adjourned without agreement.

When the parties resumed bargaining in the afternoon, the Company distributed a new written proposal of its merit increase program to the Union. Rec., vol. II, jt. ex. 7. The Company proposed to retain the existing progression steps for each job classification as guaranteed minimum wage rates. Under Colorado-Ute's plan, employees also would receive merit increases in addition to that minimum, subject to the discretion of the appropriate division head and the Company's president.

As noted by the ALJ, Colorado-Ute's president, Girt Krumins, testified that incorporating the progression steps for each job classification and eliminating supervisors' evaluations in determining merit wage increases reflected revisions to the Company's first merit proposal. Initially, the Company wanted to establish minimum and maximum wage rates for each classification with no progression steps but refined its proposal in order to respond to the Union's concern "that there was no guarantee that people would advance at all." Rec., vol. I, at 228. According to Krumins, Colorado-Ute "compromised substantially by proposing that the steps remain." *Id.* at 229. Colorado-Ute's proposal also eliminated the supervisor's evaluation as part of the merit plan, likewise in response to union concerns. "We recognized the concern . . . of favoritism and the lack of overall fairness . . . if supervisors were making these kinds of decisions. And that was a very . . . good point that I believed very strongly that we had to change." *Id.; see also*, vol. IV, doc. 1, at 8 n.9. The proposal also incorporated the Company's previous suggestion that the merit increases would not be subject to the contract grievance procedure. The Union rejected the Company's proposal because it provided only for merit increases and because it "offered less than" the last written proposal. The Union stated that it needed an ABT increase or an ABT increase in addition to a merit proposal from the Company.

August 22, 1984

The session began with the parties insisting on their previous positions. The Union again proposed a combination of an ABT increase coupled with some form of fixed merit increases. Tht Company rejected the offer and Gibson asked if the parties were at an impasse. Shaputis replied on behalf of the Union that they were not.

In the afternoon bargaining session, the Company's president, Girt Krumins, participated. Krumins explained

that due to economic pressure, the only way to increase wages was to increase productivity at the same time. Krumins asserted that the merit system was necessary to reward the office and clerical employees above what one could receive for minimum contract performance. Krumins also pointed out that the Company was allowed to pay merit in addition to contract rates to the operations and maintenance employees under a separate agreement with those employees.

After Krumins spoke to the Union, the Company presented another written proposal. Rec., vol. II, at jt. ex. 8. The proposal offered to pay employees the existing contract's progression steps as minimum hourly rates effective September 9, 1984. In addition to the contract rate, the proposal offered merit increases which were to be determined solely by management and were to be approved by the Company's president. The merit increases would not be subject to the grievance procedure, although the proposed contract, or minimum, rates would be subject to the grievance procedure.

The Union rejected the Company's proposal, stating that it was no different from its proposal of August 15. The Union then suggested that a federal mediator be brought in. The Union denied that it was at an impasse with the Company, insisting that the Company had not compromised in any way. The Company pointed out that it was offering a minimum hourly wage with no locked-in maximum.

August 29, 1984

Jerry Arnold, federal mediator, joined this negotiating session. The Union reported that it had met with its employees who had repected the Company's proposal. The Union also reported that forty-nine employees had signed a petition showing their support for an ABT increase. The Union then proposed a 4% increase for all job classifications. The Company stated that it had a problem with increasing the structure and suggested as an alternative a flat pay-off combined with merit.

In the afternoon bargaining session, the Company made a specific proposal to pay those on the payroll as of September 8, 1984, a one-time cash payment of one hundred dollars and institute a merit increase system in addition to the one-time payment. The Company's proposal also stated that employees would receive at least two reviews within sixty days of implementing the new system, although there was no guarantee reviewed employees would receive an increase. The Union rejected the offer, noting that it amounted to only a .0066% ABT increase.

August 30, 1984

The Union formally rejected the Company's August 29 proposal. The Union questioned the propriety of the proposal in the context of the wage reopener because it represented an attempt to change the wage structure, a subject of general contract negotiations. The Company rejected these contentions stating that because its proposal dealt with compensation it came within the "wages" reopener.

September 5, 1984

The parties continued bargaining with the federal mediator. The Company formally rejected the Union's 4% ATB increase proposal. The Union then proposed to leave the current wage structure intact and grant a one-time payment of one-thousand dollars ($1,000.00) to each employee.

The Company called the Union's proposal "lousy" and rejected it. Rec., vol. I, at 73. It then presented the Union with what it called the "Final Company Offer." Rec., vol. II, jt. ex. 11. The final offer included the existing step increases, *i.e.*, advancement based on established time intervals for each job classification, as a guaranteed contract minimum, subject to the grievance and arbitration procedure.[3] Rec., vol. I, at 75. The final

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[3] Employees could discuss their merit wage increase with Colorado-Ute's president, Girt Krumins, although the merit increases could not be grieved. Rec., vol. I, at 88. Joan Hiss Deskin testified

offer also had a discretionary component, permitting the appropriate division head and president to make merit increases based on the criteria of individual performance and contribution to the job. The merit increases, however, would be within the fixed range of the progression steps. As evidenced by the final offer, Colorado-Ute continued to acquiesce in the Union demand for wage guarantees by leaving progression steps intact, and in its demand for a more impartial evaluation process by proposing that the Company president and appropriate division head make wage decisions. The amount and frequency of the merit increases would not be subject to the grievance procedure. The Company's "final offer" stated that if it were rejected, the Company "reserve[d] the right to 'impasse' its proposal." Rec., vol. II, at jt. ex. 11.

The Union counter-proposed a wage system consisting of an accelerated progression [4] with a 4% increase for all employees in the top step of their classification. Rec.,

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that she had discussed her merit increase with Krumins. *Id.* at 161-171. Deskin, a former union steward and negotiator testified that, in her opinion, her discussion with Krumins did not constitute "negotiation" with respect to wages. Krumins discussed the range of merit increases, and the criteria for granting them, but he testified that he never discussed a future merit increase with any employee. *Id.* at 236-250.

In *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 767 (1991), the court denied enforcement to an NLRB order that permitted an employee to bargain to impasse over a clause that would have permitted the company to deal directly with its employees over retirement issues. The holding in the *Toledo Blade* does not apply to the instant case. The clause at issue here does not "entail [the employer's] negotiating with its employees," whereas the clause in *Toledo Blade* contemplate[d] direct negotiations between employer and employees." *Id.* at 1224.

[4] Accelerated progression resembles merit pay to the extent that it gives the employer the right to move any employee upward through the procession steps as it deems fit rather than on a fixed schedule.

vol. I, at 78. The Company rejected the Union's counter-proposal.

Implementation of Company's Final Offer

After the September 5 bargaining session, the unit employees rejected the Company's final offer by a vote. On September 12, Gibson wrote Joens that the Company believed the parties were at impasse. Gibson also notified Joens that he intended to implement the final offer on September 23.

On September 18, the unit employees began a strike against Colorado-Ute to protest the failure of the Company to agree to wage terms with the Union. On two occasions during the strike, September 20th and 24th, Gibson called the Union's "hot line." The first message stated that the Union would make another wage offer to the Company to resolve the impasse and the second message reported that the Company had rejected the union's proposal for "resolving the impasse." Rec., vol. IV, doc. 1 at 11.

In the negotiating sessions on September 18 and 19, the Company continued to insist on its merits proposal of September 5, and its management prerogative to set the amount and timing of such increases. The Company also reasserted its intention to implement its merit proposal on September 23. The Union rejected the Company's merit proposal and on September 19 made its "final offer" to the Company of a 4% ATB increase.

On September 20, the Union offered a strike settlement by proposing one of three alternatives: (1) submit the Union and Company offers to an arbitrator with instructions to choose either proposal; (2) submit both proposals to an arbitrator to select a "fair and equitable" wage agreement; and (3) permit Krumins to meet with unit employees to explain the Company's wage offer and submit the proposal to unit employees for a binding, secret-ballot vote. Rec., vol. II, jt. ex. 17.

In a letter dated September 24, the Company stated that it had begun implementing its merit pay program and that it would "deliver the results of that implementation" to the Union at the next bargaining session. Rec., vol. II, jt. ex. 18.

On September 27 the federal mediator called another bargaining session. At this meeting Gibson gave the union the results of the merit increases the company had implemented as he had advised the union he would. *See id.; see also* rec., vol. I, at 85-86.[5]

Post-Implementation Bargaining Sessions

The Union continued to insist on an ATB increase and to refuse to accept the Company's merit plan. Further negotiation of the merit component of the wage system was obstructed by the apparently irreconcilable positions of the Union and the Company.

In the course of further negotiations, the Union continued to insist that it should be consulted on the criteria for merit increases, and that employees have the right to grieve over their respective merit increases. The Company, on the other hand, reasserted its management prerogative to determine the amount and timing of merit increases and to permit individual questions or complaints to be directed to the Company president. After a meeting held March 27, 1985, negotiations ceased without agreement between the parties.

Proceedings Below

Subsequent to the negotiations, the Union filed a complaint alleging that Colorado-Ute had violated section 8(a)(5) of the Act by failing to bargain in good faith with the Union, had engaged in surface bargaining, and had unlawfully implemented the terms of its wage offer during negotiations. *See* rec., vol. IV, doc. 1, at 1. The

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[5] Merit increases were also awarded during post-impasse negotiations, the results of which were forwarded to the Union.

Union also alleged that the wage provisions implemented by Colorado-Ute exceeded the proposal it made, and that Colorado-Ute had engaged in direct dealing with an employee regarding wages. *Id.*[6]

A hearing was held, and the ALJ held that Colorado-Ute's insistence on its merit proposal did not amount to a failure to bargain in good faith. *Id.* at 26. The ALJ also found that the parties had reached a valid impasse when the Union rejected Colorado-Ute's proposal of September 5. *Id.* at 27. The ALJ concluded that upon reaching impasse Colorado-Ute was "free to unilaterally implement changes in employment terms and conditions" consistent with its final offer. *Id.* at 27. In accordance with the terms of that offer, the ALJ concluded that Colorado-Ute could determine the amount and frequency of merit reviews at its discretion: "Thus, no limitations were contained in Respondent's wage proposal regarding the number of times an employee could receive a merit review or the percentage of wage increase that could be granted." *Id.* at 29.

On appeal to the NLRB, the Union and the Board's General Counsel argued, *inter-alia*, that Colorado-Ute had acted unilaterally in granting merit increases in violation of section 8(a)(5), in spite of the fact that the parties had reached a valid impasse, because the Company had never bargained over the "specific terms" of the merit increases, *i.e.*, the actual timing and amount of individual increases. They contended that through its final merit wage proposal, Colorado-Ute in effect demanded a "waiver" from the Union of its statutory right to bargain over the timing and amounts of employee wage increases, a waiver the Union never gave. The NLRB agreed. In its opinion, it stated that "[t]he implementation of a

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[6] In charges not appealed to this court, the Union's initial complaint also charged certain violations of 29 U.S.C. § 158(a)(1) by Colorado-Ute.

merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted." Rec., vol. IV, doc. 8, at 6. It therefore concluded that, in proposing to exclude the Union from negotiation over the timing and amount of such increases, Colorado-Ute's wage proposal, which retained total management discretion, effectively construed a waiver of the Union's right to bargain over wage terms. Accordingly, the NLRB held that Colorado-Ute could not implement its offer final at impasse. "Where an employer proposal seeks the union's waiver of statutory rights, . . . impasse is no substitute for consent." *Id.* at 9.

The NLRB further declared:

> "Having failed to secure a waiver of the Union's statutory right to bargain over the merit increases' timing and amounts, the Respondent was not free to grant increases without consulting with the Union about these matters. The Respondent never did so. Instead, it presented the Union with the results of its merit reviews after increases had already been granted. Further, when the Union was shown the first set of merit increases in September 1984, it inquired whether the Respondent would negotiate over the increases, and whether the Union could approach the Respondent on an employee's behalf if the employee was dissatisfied with a merit increase. In both instances, the Respondent answered no. We conclude that the Respondent's failure and refusal to bargain with the Union over the timing and amounts of merit increases violated Section 8(a)(5) of the Act."

Id. at 10.

Notwithstanding its conclusion that Colorado-Ute could not implement its final offer at impasse, the NLRB agreed

with the ALJ that Colorado-Ute had bargained in good faith and that the parties has reached a legitimate impasse. The NLRB also concluded that merit increases were a subject of mandatory bargaining. Therefore, the order reflected the NLRB's opinion that circumstances in the instant case presented an exception to the rule that "if the parties reach good-faith impasse in negotiations, the employer generally does not violate section 8(a)(5) by thereafter implementing changes with those consistent with those proposed to the union." *Id.* at 8.

II.

Standard of Review

Enforcement of an NLRB order is granted when the NLRB has correctly applied the law and its findings are supported by substantial evidence in the record as a whole. *Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1411 (10th Cir. 1986). In reviewing the NLRB's interpretation of the NLRA, we recognize that "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (the NLRB has "considerable authority to interpret provisions of the NLRA"). Nonetheless, the judgment of the NLRB is subject to judicial review. Enforcement of its orders may be denied where its judgment has no reasonable basis in the law; its interpretation is fundamentally inconsistent with the NLRA and an attempt to usurp " 'major policy decisions properly made by Congress;' " and where the Board has moved " 'into a new area of regulation which Congress has not committed to it.' " *Ford Motor Co.*, 441 U.S. 497 (citations omitted).

Statutory Right to Bargain

Under section 8(a)(5) of the NLRA, employers commit an unfair labor practice by "refus[ing] to bargain collectively with the representatives of [their] employees." 29 U.S.C. § 158(a)(5). Section 8(d) defines the obligation to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Id.* § 158(d). The Act, therefore, requires the employer to bargain collectively regarding wages. It is well established that merit wages are encompassed within this statutory language and are a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *see also, J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948).

Our inquiry begins by determining the scope of the duty to bargain with respect to merit increases. The Union and the Board contend that the Union has a statutory right to bargain over the timing and amount of wages. They argue, therefore, that proposing and bargaining for merit wages, wherein the frequency and amounts of such wages are subject to the employer's discretion, does not vindicate that right, and that such merit increases cannot be implemented upon impasse. It is the Board's position that an explicit waiver by the Union of its right to bargain is thus required. The Board also contends that the duty to bargain imposed by sections 8(a)(5) and 8(d) encompasses an obligation to "bargain about *particular* economic terms." NLRB Brief at 27 (emphasis added).

> "[T]he Company was free to satisfy its bargaining obligation by making a proposal that would permit the Union to engage in meaningful bargaining at the outset over the timing and amounts of the merit wage increases. If the parties then reached impasse over timing and amounts, the Company would be free to

> implement its merit increases without further negotiations. The choice was the Company's: either to bargain with the Union about the economic terms at the outset or to seek a waiver of the Union's statutory right to bargain and, if unsuccessful, to bargain about those terms prior to implementation."

Id. at 27-28. We disagree with the Board's contention and conclude that, given the bargaining history in this case, the Union's statutory right to bargain was vindicated by hard bargaining over merit wage proposals.

Precedent does not support the Board's position that the Union's right to bargain can be vindicated only by discussing the economic terms of particular merit increases, rather than a general proposal that the employer be permitted to exercise discretion with respect to merit wage programs. In its decision, the NLRB relied on *Onieta Knitting Mills, Inc.*, 205 N.L.R.B. 500, 500 n.1 (1973), as support for the proposition that although at least eleven bargaining sessions preceded implementation of Colorado-Ute's wage plan, the Union's statutory right to bargain over wages had not been vindicated, and that further negotiation regarding the timing and amount of specific merit increases was required prior to implementation despite impasse. *See* rec., vol. I, doc. 8, at 6. However, the facts in *Onieta Knitting Mills* are wholly distinguishable from those here. In that case, the employer attempted to implement discretionary merit increases according to its "established" past practice. The employer granted the increases without notice or consultation with the union, which had been certified approximately one month earlier. The NLRB concluded that while an employer may ordinarily pursue past wage practices without consulting the union, this rule did not apply in those instances where discretion would be exercised.

> "Respondent argues that a finding that the unilateral grant of merit increases was a violation of

> Sec. 8(a)(5) would be inconsistent with the holding of this Board in *Southeastern Michigan Gas Company*, 198 N.L.R.B. No. 8, wherein we found a discontinuance of merit increases to have been a violation of Sec. 8(a)(5). We disagree. An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B. v. Katz*, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted."

Onieta Knitting Mills, 205 N.L.R.B. at 500 n.1. The remaining cases cited in support of the NLRB's holding are similarly inapposite. *See N.L.R.B. v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981); *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1195-96 (1996), *enforced*, 823 F.2d 1086) (7th Cir. 1989); *Gerkin Co.*, 279 N.L.R.B. 1012 (1986); *Koenig Iron Works, Inc.*, 276 N.L.R.B. 811 (1985); *State Bank of India*, 273 N.L.R.B. 267 (1984), *enforced*, 808 F.2d 526 (7th Cir. 1986); *Plymouth Locomotive Works, Inc.*, 261 N.L.R.B. 595 (1982). That an employer may not grant discretionary, as opposed to fixed, wage increases under the past-practices doctrine in no way answers the question whether an employer who has bargaining extensively over the right to grant discretionary merit increases may do so after reaching impasse on that very issue.

Equally distinguishable is *Katz*, 369 U.S. at 741, in which the employer implemented merit increases during

negotiations and prior to any impasse, contending the increases were justified on the bases of preserving the status quo in line with established past practices. The Court said:

> "Whatever might be the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases."

Id. at 746-47 (emphasis added). We find *Katz* unhelpful here because no impasse was reached in that case.

None of the cases relied on by the Board stand for the proposition that in order to vindicate a union's right to bargain over wages, "particular" economic terms must be presented to the union during bargaining or prior to implementation upon impasse where the company is negotiating for discretionary management rights with respect to wage terms. To the contrary, *Onieta Knitting Mills* and similar NLRB ruling arose primarily in situations where the company had failed to negotiate *at all*, or had attempted to implement discretionary wage increases according to purported "established past practice." These cases do not address the crucial question at issue in this case, which is *how* must these issues be negotiated in order to vindicate the Union's right to bargain. Furthermore, as explained by the Supreme Court, "negotiation over the procedures" governing merit increases is most compelling where the union needs "to know whether or not there has been a substantial departure from past practice." *Katz*, 369 U.S. at 746. This rationale is not applicable to the

facts of this case. Moreover, none of the Board's cases involved an impasse, an omission we view as critical.[7]

We conclude that the weight of authority supports Colorado-Ute's construction of the NLRA. In *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), the Supreme Court rejected the NLRB's holding that bargaining for a strong management-rights clause, in which the employer "reserve[d] to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment," *id.* at 400 n. 5, was an indicia of bad faith bargaining or a *per se* violation of the Act itself. In so doing, the Court rejected the Board's "position that employers subject to the Act must agree to include in an labor agreement *provisions establishing fixed standards for work schedules or any other conditions of employment.*" *Id.* at 408 (emphasis added). The Court held that the employer had satisfied its duty to bargain by negotiating over the terms of the management-rights clause. In so doing, the Court rejected the view of the dissent that negotiating for a broad management-rights clause represents an attempt to "stake out an area which is a proper subject for bargaining and [to] say, 'as to this we will not bargain.'" *Id.* at 413 (Minton, J. dissenting). This decision casts considerable doubt on the position that specific terms must be presented to the Union prior to implementation upon impasse.

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[7] In *Koenig Iron Works, Inc.*, 276 N.L.R.B. 811 (1985), the NLRB specifically held that there was no impasse, and distinguished the facts in *Koenig* from an impasse situation.

> "An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.

Id. at 814 (quoting *Taft Broadcasting Co.*, 103 NLRB 475 (1967)).

The Supreme Court also implicitly rejected the Board's theory in the instant case that bargaining only for a broad management-rights clause necessarily undermines a union's right to bargain.

> "Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management' as *per se* violations of the Act."

Id. at 409. *American Nat'l* similarly rejects the Board's position that instituting discretionary wage terms necessarily abrogates, or even diminishes, a union's right to bargain. To the contrary, by vigorously bargaining over how a discretionary wage clause would be implemented, an employer *vindicates* the union's right to bargain.

In this case, as is apparent from our recitation of the facts, the parties bargaining vigorously over the subject of wage increases and the methodology by which merit increases would be granted. Colorado-Ute initially proposed a single wage rate for each job classification with a merit increase, but throughout negotiations that proposal changed and took no more definite contours. There was also considerable negotiation and movement on the part of Colorado-Ute as to how wages would be fixed. Prior to implementation of its final proposal, the Company suggested various methodologies for arriving at the amount of increases. Several of these contemplated fixed economic terms the Union now argues it was entitled to be presented with during bargaining or prior to implementation, such as: setting a single rate with a merit increase component; eliminating progression steps, and implementing a merit system; guaranteeing minimum, midpoint, and maximum wage rates for each job classification; fixing the amount of increases by tying them to those amounts that would otherwise be distributed by the step increase system; and leaving the step increases

in place and paying additional merit increases. Colorado-Ute initially contemplated instituting merit increases on the basis of the supervisor's opinion. Subject to further bargaining, however, it agreed to award merit increases on the basis of an evaluation by the appropriate division head and the Company's president.

Further, the merit increases proposed by Colorado-Ute limited the employer's discretion to the extent that they were linked to the identifiable criteria of job performance and contribution on the job. While the discretionary component of wage increases, *i.e.*, that based on merit, was not subject to the grievance procedure, the individual employees could grieve the failure to receive the minimum rate of their progression step rate. The Company proposal initially permitted employees to meet with Krumins, the Company president, if they felt they had been treated unfairly. In negotiations subsequent to impasse, Colorado-Ute likewise proposed to allow individual employees to request a meeting with Krumins, also attended by a union representative, to discuss their merit increases. Rec., vol. IV, doc. 1, at 15.

Similarly, other post-impasse negotiations demonstrated a continued willingness on the part of Colorado-Ute to discuss the methodology for implementing merit increases. These negotiations covered, for example, such topics as performance standards, *id.* at 14, subjecting the timing of merit increases to the contract grievance procedure, *id.* at 17, and the possibility of receiving union input into the criteria underlying merit increases, rec., vol. I, at 329.

Right to Implement At Impasse

The NLRB erred by trying to safeguard the right to bargain by limiting the employer's right to implement its final offer based on the substantive content of its wage proposal. As acknowledged by the NLRB in its opinion, the general rule is that an employer has the right upon impasse to implement its final offer with respect to a mandatory subject of bargaining such as wages.

> "Section 8(a)(5) of the Act requires that an employer bargain with the union before effecting changes in the terms and conditions of employment. *But if the parties reach good-faith impasse in negotiations, the employer generally does not violate Section 8(a)(5) by thereafter implementing changes consistent with those proposed to the union. Taft Broadcasting Co., 163 N.L.R.B. 475 (1967), enfd. sub. nom. Television Artists AFTRA v. N.L.R.B., 295 F.2d 622 (D.C. Cir. 1968). That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession. See Section 8(d) of the Act. The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent.* If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations."

Rec., vol. IV, doc. 8, at 8-9.

In the context of wage negotiations, therefore, while an employer cannot use its economic power to remove a subject completely from the bargaining table, it is not compelled to agree to the union's wage terms. That being the case, the union does not enjoy a unilateral veto over wage terms, and the employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse. *See Katz*, 369 U.S. at 745 & n.12; *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 966 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Consistent with the Act, this right exists irrespective of the parties' bargaining positions. *See American Nat'l Ins. Co.*, 343 U.S. at 401-02. To hold otherwise would conflict with the well-established proposition

that the NLRB cannot exert its power to dictate the substantive terms of the collective bargaining agreement. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103-04 (1970); *American Nat'l Ins. Co.*, 343 U.S. at 401-02 ("The theory of the Act is that the making of voluntary labor agreement is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively."); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960).

In this case, it is undisputed that the parties were at impasse. Nonetheless, the NLRB concluded that because of the wage terms Colorado-Ute proposed, it could not "proceed with implementation of [its] final offer." Rec., vol. IV, doc. 8, at 8. This conclusion is fundamentally at odds with the NLRB's own statement of the law with respect to mandatory subjects of bargaining; specifically, the rule that an employer can implement its final offer at impasse. The NLRB attempts to reconcile its order with its own competing statement of the law concerning implementation at impasse by stating that Colorado-Ute's proposal is tantamount to a waiver of the Union's bargaining power. As discussed above, however, such a clause is not a *per se* violation of the NLRA, nor does it undermine the Union's right to bargain; therefore, we do not believe it constitutes a waiver. By holding the final offer was a "waiver" of the Union's right to bargain, and that it could not be implemented without further consultation with the Union, the NLRB eviscerated Colorado-Ute's right to implement at impasse, one of its powerful economic tools for achieving its wage terms, even though these terms were lawful ones.[8] In effect, the Board's decision gave the "union a right to veto the proposed changes by withholding consent," *id.* at 8-9, in contravention of the rule of implementing at impasse. The NLRB's decision, therefore, infringes on the em-

[8] We also note that a union can exert economic pressure to achieve the wage terms it desires by striking, as the Union did in this case.

ployer's right to bargain for and implement an admittedly lawful wage proposal.

We conclude that, consistent with the NLRA, the NLRB should have used good faith bargaining requirements as a statutory check in this case. "The duty to bargain collectively is to be enforced by the application of the good faith bargaining standards of Section 8(d) . . . ." *American Nat'l Ins.*, 343 U.S. at 409. Good faith bargaining requirements ensure that an employer will not simply "go through the motions" of discussing wage proposals and then take unilateral action by implementing its own terms. *See* 29 U.S.C. § 158(d); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). These requirements thus ensure that an employer will not achieve its discretionary wage terms in bad faith.

In arguing its case, the Board condemns Colorado-Ute for maintaining a "rigid position throughout negotiations" and "steadfastly refus[ing] to consider any union proposal for involvement in deciding the timing and amounts of the increases." *Board Brief* at 13. While such rigidity could potentially be the basis for a finding of bad faith, the ALJ concluded in this case that based on the totality circumstances Colorado-Ute had negotiated in good faith as it had "engaged in hard bargaining and adhered to a legitimately held position during the wage-reopener negotiations." Rec., vol. 1, doc. 1 at 23. The NLRB affirmed this judgment, stating explicitly that Colorado-Ute "did not fail or refuse to bargain in good faith by insisting on its merit wage proposal." Rec., vol. IV, doc. 8, at 8, & n.5. While an employer's proposal may be the basis of a finding of bad faith, *see N.L.R.B. v. Wright Motors*, 603 F.2d 604, 609-610 (7th Cir. 1979), that was clearly not the case here.

III.

Because the Board erred in construing the scope of the duty to bargain and attempted to protect the Union's right to bargain by regulating the substantive terms of the wage proposal rather than applying good-faith bargaining requirements, its decision is "fundamentally inconsistent with the act," which contemplates the legality of broad management-rights clauses and the protection of the right to bargain through the application of good-faith bargaining standards. *See Ford Motor Co.*, 441 U.S. at 497-498.

We REVERSE the decision of the NLRB and deny enforcement of its order.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 27-CA-8959
27-CA-8981
27-CA-8959-2

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 111

DECISION AND ORDER

On April 30, 1986, Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

On July 7, 1987, the Board heard oral argument on behalf of the parties and the amicus, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Newspaper Publishers Association, and the Council on Labor Law Equality. Thereafter, the Respondent, the Charging Party, the General Counsel, the AFL-CIO, and the Council on Labor Law Equality filed supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, the able argument of counsel, and the supplemental briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint allegation that the Respondent acted unilaterally in granting merit increases to employees without meeting its bargaining obligation with the Union. We agree with the General Counsel's and Charging Party's exceptions that the judge's dismissal of this allegation should be reversed.

The Respondent and the Charging Party (the Union) were parties to a collective-bargaining agreement covering office and clerical employees with a term extending from September 11, 1983, to September 13, 1986.[2] The contractual wage rates for each job classification were contained in seven progression steps. Advancement from step to step was based on tenure. Employees advanced one step a year, except for the first two steps, which were completed in 6 months each.

In late July 1984 the parties commenced midterm wage negotiations under the contract's wage reopener provision. From the outset the Union insisted on an across-the-board

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[1] The judge found that at the parties' August 22, 1984 bargaining session, Company President Girt Krumins "reminded the Union negotiators that under the terms of the agreement covering the operations and maintenance employees, Respondent was permitted to pay those employees above the contract rates based on a merit decision by management." The record reveals, however, that the operations and maintenance employees did not work under a merit pay system similar to the program the Respondent proposed for the office and clerical employees, and that Krumins' reference to operations and maintenance employees at the August 22 session concerned the practice of allowing the Respondent to "double-jump" those employees, see judge's decision fn. 6, a practice also allowed under the office and clerical employees' collective-bargaining agreement.

Contrary to the judge's finding in part IV,B, of his decision, employee Joan Hiss' total wage increase in January 1985 amounted to 9.8 percent. The raise included an 8-percent merit increase.

These corrections do not affect the result in this case.

[2] There were about 72 employees in the unit.

(ATB) wage increase for the unit employees. The Respondent, on the other hand, insisted that any increase in wages would have to be through the institution of some sort of form of merit program under which individual employee merit increases would be granted at times and in amounts determined by management and would not be subject to the contract's grievance procedure. The Union rejected the Respondent's merit wage proposals.

At a meeting on September 5, the parties' 10th bargaining session, with no agreement yet reached on any wage terms, the Respondent presented a written proposal it terms its "final offer." The proposal retained the existing contractual progression steps and wage rates, but added a merit pay system on top of these rates. The proposal explained the operation of merit pay program as follows:

> The merit increase program will provide employees the opportunity of receiving additional increases based on their individual performance and contribution on their job. The amount and frequency of such merit increase will be determined by the Division Head and President and will not be subject to the grievance procedure.

The proposal further stated, "If Final Offer rejected, the Company reserves the right to impasse its proposal."

On September 6 the Union submitted the Respondent's offer to the employees for a vote. The employees voted to reject the proposal. On September 12 the Respondent notified the Union that the Respondent considered the parties to be at impasse and that the Respondent would implement its final offer on September 23. At bargaining sessions on September 18 and 19 the Respondent resubmitted its September 5 offer and continued to assert its intention to implement the proposal on September 23, while the Union again rejected the offer and reasserted its opposition to the proposed merit wage program. In a letter to the Union dated September 24 the Respondent announced that it had begun implementing its merit wage program

and that it would "deliver the results of that implementation" to the Union at the next bargaining session.

The next bargaining session took place on September 27. Company negotiator John Gibson presented to the Union a handout detailing the results of the first set of merit reviews. According to the handout, 44 of the 47 employees reviewed received merit increases. The merit increases ranged from 2.2 percent to 8.5 percent. Union negotiator Robert Mason asked Gibson if the handout was a proposal. Gibson replied that the handout reflected the Respondent's implementation of its final offer and was not a proposal. Mason asked whether there was any way to question an employee's merit increase. Gibson stated that the employee could see the appropriate division head or the company president. Mason then asked if the Union could talk to management on behalf of the employee. Gibson said no.

On October 3 at the next bargaining session Gibson asked the union negotiators what they thought of the September 27 handout. Mason answered that the Union rejected the Respondent's implementation proposal. Gibson insisted that the handout represented the Respondent's implementation and was not a proposal. Mason then asked if Gibson meant that the Respondent would not negotiate regarding the implementation. Gibson replied that the Respondent would not.

On October 30, 1984, the Respondent notified the Union by letter that it had conducted merit reviews for the 26 employees who had not been reviewed earlier and listed the merit increases granted. Thereafter, commencing in 1985, the Respondent sent the Union letters about every month listing the individual employee wage increases that had taken effect the previous month.[3]

At the October 3 bargaining session and at the eight sesisons that followed, the Union continued to press for

[3] The listed increases included both merit and step increases.

an ATB increase and to express its unwillingness to accept the terms of the Respondent's merit wage program. The Union proposed, among other things, that the parties establish a joint union-management committee that would develop criteria for merit increases and devise the manner in which disagreements over merit increases would be resolved, that employees be guaranteed written summaries of their merit wage evaluations, and that employees have the right to grieve and arbitrate merit increases or that there be a special union-management committee to hear and decide employee appeals. The Respondent rejected these union proposals and continued to insist that "individual performance" and "contribution on the job" were the only criteria necessary, that the amount and frequency of merit increases should be determined solely by management and should not be subject to the grievance procedure, and that the only appeal should be to the company president. Negotiations ceased after a meeting held March 27, 1985, with the parties having reached no agreement.

The administrative law judge found that the Respondent's insistence on its merit wage proposal did not amount to a failure or refusal to bargain in good faith. Further, the judge found that the parties had reached a valid impasse after the Respondent's September 5 proposal was rejected, and that having reached impasse the Respondent was therefore free to implement the proposal when it did so.

The General Counsel and the Charging Party argue, inter alia, that the judge failed to address the allegation that the Respondent acted unilaterally in granting merit increases even if the parties had reached a valid impasse. They contend that the Respondent's September 5 proposal sought the Union's waiver of its statutory right to bargain over the timing and amounts of employee merit increases. Having failed to secure that waiver from the Union, the Respondent therefore acted unilaterally in violation of Section 8(a)(5) of the Act when, under the guise

of implementing its final offer, it proceeded to grant merit increases without consulting with the Union about timing and amounts. We agree with the General Counsel and the Charging Party in this respect.[4]

It is well established that merit wages are a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 745 (1962). The bargaining obligation encompasses a duty to bargain over the procedures and criteria for granting merit increases to employees. Id. at 746-747. Even where a merit program with procedures and criteria is lawfully in place, the actual granting of merit increases under the program may involve substantial discretion. The implementation of a merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted. *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

The Respondent's September 5 proposal provided for the establishment of a merit wage program but gave very few details concerning how merit increases would be determined or granted. The only stated criteria for the employees' merit increases were "individual performance" and "contribution on their job." The proposal set no minimum or maximum for the merit increases, nor did it fix times when the increases would or could be granted. In-

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[4] However, we find no merit in the General Counsel's and the Charging Party's contention that the Respondent's proposal concerned a permissive subject of bargaining. The specific subject matter of the Respondent's proposal, merit wage increases, has been held by the Supreme Court to be a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 745 (1962). See also Sec. 8(d) of the Act defining the duty to bargain as including the obligation to confer with respect to "wages." As discussed infra, the Respondent's proposal would require the Union to waive its statutory right to bargain over the merit increases' timing and amounts. The inclusion of this waiver provision in the Respondent's proposal does not "transform" it from a mandatory to a permissive subject of bargaining. See *Toledo Blade Co.*, 295 NLRB No. 68 (issued today).

stead, the proposal stated simply that the timing and amount of the merit increases "will be determined by the Division Head and President." Not only did the proposal provide no role for the Union in the initial determination of the increases' timing and amounts, the proposal also exempted management's decision on these matters from union or employee challenge through the contractual grievance procedure.

Clearly, then, the implementation of the September 5 proposal would involve virtually unlimited discretion in determining the timing and amounts of merit increases. These are matters over which the Union has a statutory right to be consulted. In proposing to exclude the Union from this exercise of discretion over employees wages, the Respondent was seeking the Union's waiver of its statutory rights under Section 8(a)(5) of the Act.

The Board requires that a waiver of bargaining rights under Section 8(a)(5) not be lightly inferred but must be clear and unmistakable. *Tocco Division of Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). Here, despite earnest effort, the Respondent was unable to secure the Union's waiver of its right to bargain over the merit increases' timing and amounts. The Union never agreed to contractual language waiving its right to bargain. Nor does the parties' bargaining history establish a waiver. The Union, both before and after impasse, expressed its opposition to the Respondent's merit proposal for, among other things, precisely the fact that it would exclude the Union from participation in the merit pay program.

Contrary to the judge's conclusion, the Respondent's unilateral exercise of discretion and granting of merit increases was not privileged by impasse. We agree with the judge that the Respondent did not fail or refuse to bargain in good faith by insisting on its merit wage pro-

posal,[5] and that the parties' impasse after the rejection of the Respondent's September 5 offer was a lawful impasse. The Respondent was free to insist to impasse as a condition to agreement on any wage terms that the Union agree to waive the statutory rights at issue here. But the Respondent's freedom to pursue this end and to exert this bargaining pressure to obtain the end does not carry with it a right, once having failed and reached impasse, to proceed with implementation of the final offer as if the Respondent had successfully secured the Union's waiver.

Section 8(a)(5) of the Act requires that an employer bargain with the union before effecting changes in terms and conditions of employment. But if the parties reach good-faith impasse in negotiations, the employer generally does not violate Section 8(a)(5) by thereafter implementing changes consistent with those proposed to the union. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession. See Section 8(d) of the Act. The employer's duty to bargain does not give the union a right to veto the proposed

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[5] See *Reichhold Chemicals*, 288 NLRB No. 8 (Mar. 17, 1988) (*Reichhold Chemicals II*), modifying *Reichhold Chemicals*, 277 NLRB 639 (1985) (*Reichhold Chemicals I*), cited by the judge.

In agreeing with the judge that the Respondent did not fail to bargain in good faith by insisting on its merit increase proposal, Member Johansen does not rely on the judge's finding that the proposal was "not unreasonable." In Member Johansen's view, the Board should not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. *Reichhold Chemicals I*. See his dissenting opinion in *Reichhold Chemicals II*.

changes by withholding consent. If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations.

Consider, as a typical example, a case where an employer proposes in negotiations for a new contract that wages should be reduced from $7 an hour to $6 an hour. The union proposes that wages be increased to $8 an hour. The parties insist on their respective positions until they reach a good-faith impasse in negotiations. Having reached a point where further bargaining would be fruitless, Section 28(a)(5) does not require the employer thereafter to pay its employees $8 an hour as the union demanded, or to abandon its proposal and leave wages at $7 an hour. The employer is free to implement its proposal and pay employees $6 an hour.

In the example above, the employees have no statutory right to be paid $8.00 or $7.00 an hour rather than $6.00 an hour, thus the Act does not require that the employer obtain the union's consent before paying $6.00 an hour. The Act only requires that the employer propose the wage rate and bargain with the union in good faith before implementation. Where an employer proposal seeks the union's waiver of statutory rights, however, impasse is no substitute for consent. An employer may insist to impasse as a condition of agreement that the union agree to a no-strike clause. *Shell Oil Co.*, 77 NLRB 1306 (1948). Absent the union's agreement, however, the employer is not thereafter free to implement its proposal by firing striking employees.

Here the Respondent insisted to impasse that employees be eligible for wage increases on the basis of merit, that merit be defined as "individual performance" and "contribution on the job," and that the merit increases be granted at times and in amounts determined solely by management. Having reached impasse, the Respondent

was free to consider employees for merit increases and to base its consideration on the criteria mentioned above, for neither of these aspects of its proposal involved the waiver of a statutory right. Employees have no statutory right to be awarded wage increases only on the basis of tenure rather than merit, nor do they have a statutory right not to have merit wage increases based on these two criteria.

The employee's bargaining representative does have the right, on the other hand, to be consulted over the timing and amounts of merit increases before the increases are granted. Having failed to secure a waiver of the Union's statutory right to bargain over the merit increases' timing and amounts, the Respondent was not free to grant increases without consulting with the Union about these matters. The Respondent never did so. Instead, it presented the Union with the results of its merit reviews after increases had already been granted. Further, when the Union was shown the first set of merit increases in September 1984, it inquired whether the Respondent would negotiate over the increases, and whether the Union could approach the Respondent on an employee's behalf if the employee was dissatisfied with a merit increase. In both instances, the Respondent answered no. We conclude that the Respondent's failure and refusal to bargain with the Union over the timing and amounts of merit increases violated Section 8(a)(5) of the Act.

Amended Conclusions of Law

1. Substitute the following for Conclusion of Law 3.

"3. By unilaterally granting merit wages increases to employees without offering to bargain with the Union over the timing and amounts of the increases, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. Delete Conclusions of Law 4 and 5 and renumber the subsequent paragraphs.

3. Add the following as Conclusion of Law 6.

"6. The Respondent has not otherwise violated the Act."

The Remedy

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to bargain with the Union over the timing and amounts of employee merit increases. Further, we shall also order the Respondent, on the Union's request, to cancel the wage increases unlawfully granted to employees through the Respondent's unilateral action. Nothing in our Order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Colorado-Ute Electric Association, Inc., Montrose, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully soliciting striking employees in order to induce them to abandon support of the strike and of International Brotherhood of Electrical Workers, Local No. 111 by promising them increased wages and longer hours of work.

(b) Threatening employees for engaging in lawful strike activity.

(c) Granting merit wage increases to employees without offering to bargain with the Union over the timing and amounts of increases.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with International Brotherhood of Electrical Workers, Local No. 111 over the timing and amounts of employee merit wage increases.

(b) If the Union requests, cancel wage increases unlawfully granted to employees through the Respondent's unilateral action.

(c) Post at its Colorado facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. June 15, 1989

WILFORD W. JOHANSEN, Member

MARY MILLER CRACRAFT, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN STEPHENS, concurring.

I concur in the result in this case.

Dated, Washington, D.C. June 15, 1989

JAMES M. STEPHENS, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and had ordered us to post and abide by this notice.

WE WILL NOT unlawfully solicit striking employees in order to induce them to abandon support of the strike and of International Brotherhood of Electrical Workers, Local No. 111 by promising them increased wages and longer hours of work.

WE WILL NOT threaten you for engaging in lawful strike activity.

WE WILL NOT grant merit wage increases to you without offering to bargain with the Union over the timing and amounts of the increases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union over the timing and amounts of employee merit wage increases.

WE WILL, if the Union, requests, cancel wage increases unlawfully granted to employees through our unilateral action.

COLORADO-UTE ELECTRIC
ASSOCIATION, INC.

(Employer)

Dated ———— By ————————————
(Representative) (Title)

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Cases 27-CA-8959
27-CA-8981
27-CA-8959-2

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 111

Michael W. Breeskin and Arturo E. Roybal, Esqs., of Denver, CO, for the General Counsel.

Marlene J. Joens, Assistant Business Manager, of Denver, CO, for the Charging Party.

Joseph M. Goldhammer and Dennis E. Valentine, Esqs., (*Brauer & Buescher, P.C.*), of Denver, CO, on the brief for the Charging Party.

Carol A. Curran, Esq., of Montrose, CO, for the Respondent.

ERRATUM

The following correction is hereby made by my Decision issued on 30 April 1986:

Page 11, line 28, change "to resolve the impasse" to read "to resolve the impasse."

Dated: 30 April 1986

/s/ Gordon J. Myatt
GORDON J. MYATT
Administrative Law Judge

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Carol A. Curran, Esq., of Montrose, CO, for the Respondent.

DECISION

Statement of the Case

GORDON J. MYATT, ADMINISTRATIVE LAW JUDGE: Upon several charges filed by International Brotherhood of Electrical Workers, Local No. 111 (Union)

against Colorado-Ute Electric Association, Inc. (Respondent) in September 1984 and January 1985, the Regional Director for Region 27 consolidated the cases and, on 12 March 1985, issued a Consolidated Complaint and Notice of Hearing. Essentially, the consolidated complaint alleges that during wage-reopener negotiations Respondent failed to bargain in good faith with the Union, engaged in surface bargaining, and unlawfully implemented the terms of its wage offer during negotiations. The complaint also alleges that the wage provisions implemented by Respondent exceeded the proposal it made to the Union. In addition, the complaint alleges that Respondent bypassed the Union and engaged in direct dealing with an employee concerning wages. All of the above conduct is alleged to have been in violation of Section 8(a)(5) of the National Labor Relations Act, as amended (the Act), 29 U.S.C. 151 *et seq.* The complaint further alleges that during an economic strike that occurred while wage negotiations were in progress, Respondent, acting through a supervisor, promised an employee higher wages and more hours of work to induce the employee to abandon his strike activity. This conduct is alleged to be in violation of Section 8(a)(1) of the Act. Finally, the complaint alleges that during the same strike Respondent, through a supervisor, threatened an employee with reprisals for engaging in strike activity. This conduct is also alleged to be in violation of Section 8(a)(1) of the Act. Respondent filed an Answer in which it admitted certain allegations of the consolidated complaint, denied others, and specifically denied committing any unfair labor practices.

A hearing was held on this matter on 20 and 21 August 1985 in Montrose, Colorado. All parties were represented at the hearing and afforded opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Briefs were submitted and have been duly considered.

Upon the entire record in this case, and upon my observation of the witnesses who testified, I make the following:

Findings of Fact

I. Jurisdiction

The pleadings admit, and I find, that Respondent is an incorporated cooperative association engaged in the business of generating, transmitting, purchasing and selling electrical energy at wholesale rates to its member associations, who in turn distribute the energy at retail rates to customers throughout Colorado. Respondent's principal office and place of business is located in Montrose, Colorado and it operates other facilities and power plants at Craig, Hayden, and Nucla, Colorado. In the course of its business operations, Respondent annually purchases and receives goods and materials and services valued in excess of $5,000 directly from points located outside the State of Colorado. Respondent also annually derives gross revenues in excess of $250,000 from its business operations. On the basis of the above, I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The pleadings admit, and I find, that International Brotherhood of Electrical Workers, Local No. 111 is a labor organization within the meaning of Section 2(5) of the Act.

III. Motions Regarding the Pleadings

The consolidated complaint alleges in paragraph 11 that Respondent failed and refused to bargain collectively with the Union by engaging in ceretain specified conduct. This conduct is set forth in several lettered subparagraphs of

paragraph 11. Subparagraphs 11(a) and (b) allege as follows:

> (a) Since on or about September 5, 1984, Respondent has, during wage reopener negotiations, insisted to impasse, that wages received by employees consist of a set minimum hourly rate and merit increases which would be determined solely at the discretion of management, and not subject to the grievance procedure.
>
> (b) On or about September 23, 1984, Respondent implemented its impasse proposal.

Respondent's counsel contended at the conclusion of the General Counsel's case, and again in her brief, that the above subparagraphs do not affirmatively allege any conduct which violates the Act. Respondent's counsel asserts, and continues to assert, that under the case law Respondent may lawfully negotiate to impasse and then implement the terms of its proposal; provided such implementation is consistent with the final offer made to the Union. Thus, Respondent argues for the dismissal of subparagraphs 11(a) and (b) on the grounds the General Counsel failed to affirmatively plead that the conduct described therein constituted unfair labor practices. Counsel for the General Counsel, in response to Respondent's motion, sought to amend this portion of the consolidated complaint to substitute the expression "invalid impasse" for the word "impasse." The General Counsel's motion was denied. The General Counsel also asserted that when read together, subpargraphs 11(a) and (b) were sufficient to plead unlawful conduct by Respondent. Respondent's motion to dismiss was denied at the hearing with permission to renew it in Respondent's brief.

Although this portion of the pleadings appears to be inartfully drawn, I am persuaded, after a review of all of the sections of paragraph 11, that Respondent's motion to dismiss subparagraphs (a) and (b) should be denied.

Subparagraph 11(e) states that by the conduct set forth in subparagraphs 11(a)-(d),[1] "Respondent has sought to undermine the Union's status as representative of Respondent's employees in order to discourage employees from supporting the Union for the purposes of collective bargaining, and has engaged in surface bargaining." When read in conjunction with subparagraph 11(e), it becomes apparent that the General Counsel is affirmatively alleging, among other things, that the conduct described in subparagraphs (a) and (b) constitute surface bargaining. Since surface bargaining by a party is unlawful, I find the General Counsel has affirmatively pled that the conduct in the disputed subparagraphs constitutes unfair labor practices. Moreover, the record fully demonstrates Respondent was not confused or misled regarding the thrust of these allegations of the complaint and that it suffered no prejudice in the preparation or presentation of its defense against them. Accordingly, Respondent's renewed motion to dismiss subparagraphs 11(a) and (b) of the consolidated complaint is hereby denied.

IV. The Alleged Unfair Labor Practices

A. *The Wage Negotiations*

1. The Bargaining Prior to Implementation of Respondent's Final Offer

The record reveals there is very little factual dispute regarding the events leading up to or occurring during the wage-reopener negotiations between the parties. The Union and Respondent are parties to a collective-bargaining agreement covering Respondent's office and clerical employees. In addition, the Union represents Re-

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[1] Subparagraph 11(c) alleges Respondent bypassed the Union and engaged in direct dealing with a unit employee. Subparagraph 11(d) alleges Respondent unilaterally granted unit employees wage increases without bargaining with the Union and that the wage increases were in amounts greater than Reepondsnt offered to the Union during negotiations.

spondent's operating and maintenance employees under a separate collective-bargaining agreement. The term of the current clerical agreement is from 11 September 1983 to 13 September 1986. (See Joint Exhibit No. 1). The pay rates for each job classification in the office and clerical unit are contained in seven progression steps and the basis for advancing in the progression steps is the amount of time an employee has worked for Respondent.[2]

Included in the current agreement is a provision for the reopening of negotiations for wages by either party upon the giving of the prescribed notice prior to 8 September 1984.[3] The Union gave Respondent notice pursuant to the wage-reopener provision on 8 June 1984.[4] (See Joint Exhibit No. 2). Negotiations on this matter began between the parties on 31 July. Because of the nature of the allegations, it is necessary to summarize in some detail the events that occurred during the individual bargaining sessions. However, that there is little factual dispute concerning the bargaining events is evidenced by the detailed bargining notes kept by both parties and submitted as part of the record.[5]

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[2] Although there are seven progession steps in each job classification, employees reach the last step upon their sixth year of employment. The first step or hire-in rate is completed in 6 months and the employee then advances to the second step for the next 6 months. Thereafter, each progression step is yearly.

[3] The specific provision in the existing agreement for the wage reopener is contained in Article 32 and provides, in part, as follows:

> (d) . . . it is specifically agreed that either party may elect to negotiate wages included in Appendix B by giving notice to the other party not less than eighty-five (85) days, nor more than ninety-five (95) days prior to midnight, September 8, 1984 and midnight, September 14, 1985. . . .

[4] Unless otherwise indicated, all dates hereafter refer to the year 1984.

[5] The Union's notes on the bargaining sessions are contained in the record as Joint Exhibit No. 49 and Respondent's bargaining notes are in the record as Joint Exhibit No. 50.

The Union's bargaining team initially consisted of Marlene Joens and Donald Shaputis, assistant and senior assistant business managers, respectively, of the Union, and several unit employees including Joan Deskin (nee Hiss), a steward at Respondent's Craig facility. Joens was initially the chief spokesperson for the Union. Respondent's bargaining team was headed by John Gibson, manager of personnel and labor relations, and included other management representatives.

First Bargaining Session—31 July

The Union proposed a 9 percent across-the-board (ATB) wage increase for all job classifications. Gibson rejected this proposal as being unrealistic and "in another world." Gibson asserted Respondent was under pressure from other businesses in the community because Respondent's wage rates were higher than the rates which prevailed in the area. Gibson stated a wage increase was not necessary because of the built-in pay raises contained in the progression steps. Respondent proposed a single rate range for each job classification with a merit increase system based upon a supervisor's evaluation of an employee's performance. Gibson stated there was "only so much money in the pot to spend." The Union rejected Respondent's merit increase proposal and stated the percentage level for an ATB increase was negotiable. The Union further suggested that the parties could agree to freeze the current first and second 6-month hire-in rates. No agreement was reached at this meeting.

Second Bargaining Session—14 August

The parties met in the morning at Respondent's headquarters in Montrose and the Respondent continued to urge adopting a merit increase program. Gibson stated Respondent wanted to reward those employees whose work performance was over and above the norm. The Union asked the Respondent to come up from its proposal of nothing for an ATB increase and suggested they could

then split the difference between any offer made by the Respondent and the 9 percent proposed by the Union. Respondent continued to insist that an increase would have to be a merit increase. When the Union asked who would determine whether an employee was entitled to such an increase, Gibson responded this would be at the sole discretion of the employee's supervisor. The Union then asked whether Respondent could guaranteee that no favoritism or disparate treatment would occur under its merit proposal. Gibson responded in the affirmative and the Union then questioned how this could be accomplished. Gibson was unable to respond to this question. Gibson continued to reject the Union's request for an ATB wage increase. The Union proposed that Respondent could reward superior work performance by continuing the practice of "double-jumping" allowed under the current collective-bargaining agreement.[6]

In the afternoon session, the Union proposed a 7 percent ATB increase and a freeze on the present hire-in rates. Respondent rejected this proposal as being too high and because it did not contain a merit factor for rewarding an employee who was at the top of the progression steps.[7] The Union continued to reject any form of a merit wage increase, stating the Respondent had used this system before the Union became the bargaining representa-

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[6] "Double-jumping" was described as the practice of permitting Respondent to award above-average work performance by granting an employee a double step progression instead of the usual single step.

[7] Throughout the negotiations, Respondent maintained that an ATB increase was unfair to employees who were at the top of their progression steps. Because these employees could no longer receive additional wage increases by advancing through the progression steps, an ATB increase actually provided them with a smaller percentage of a wage increase than employees still eligible for future step progression. At the hearing, Respondent submitted charts demonstrating this adverse impact on the top-step employees. (See Respondent Exhibit No. 2.)

tive and that was the reason the employees sought union representation.

Third Bargaining Session—15 August

Robert Mason, the business manager of the Union, joined the Union negotiating committee. The Union continued to insist on a 7 percent ATB increase and a freeze on the hire-in rates. Respondent continued to insist on a merit increase program. The Union asked to look at Respondent's merit proposal and proposed that the parties agree to submit theeir offers to a third-party arbitrator. Respondent rejected the idea of using a third party to settle their differences. Since Respondent's merit increase proposal had not been reduced in writing, it was unable to present one to the Union.

The parties met again in the afternoon and Respondent submitted its first written proposal to the Union. (See Joint Exhibit No. 6). In this proposal Respondent sought to eliminate the progression steps contained in the current collective-bargaining agreement by establishing minimum, mid-point and maximum wage rates for each job classification. The minimum rates equaled the current second 6-month step rate contained in the existing agreement. The maximum rate amounted to an increase of approximately 3.9 percent above the top step for each classification with the exception of the materials control clerk, the work order clerk, and the inventory control clerk. These latter job classifications were frozen at the current rate in the existing agreement. The proposal also contained general guidelines to be followed by supervisors in awarding merit increases to individual employees. These tracked the guidelines followed by Respondent's supervisors in evaluating employees' work performance. They were based on three categories; more than satisfactory, satisfactory, and less than satisfactory (MSL). The guidelines also indicated proposed amounts of increases for the "M" and "S" categories and none for the "L" category. It also

contained a proposed schedule of the frequency that employees would receive a merit review but stated that the amount and frequency of individual employee increases was not subject to the grievance procedure. Gibson also told the Union negotiators that supervisors would not be compelled to follow the merit factors suggested by the guidelines nor were they compelled to give increases in the amounts contained in Respondent's proposal. Gibson stated the supervisors could grant more or less than the suggested amounts. He told the Union representatives that the amount and frequency of the wage increases was solely at the discretion of the supervisors, who would determine when employees were performing satisfactory work.

Fourth Bargaining Session—16 August

When the parties met at this negotiating session, the Union rejected Respondent's proposal in its entirety and insisted on an ATB wage increase. The Union cited possible personality conflicts between employees and supervisors as well as budget restraints preventing the granting of merit increases to worthy employees. The Union representatives also stated that the merit review process would nullify the grievance procedure; employees would be reluctant to file grievances against supervisors if they thought they were going to jeopardize their merit increases. The Union further protested that Respondent's professed concern over rewarding employees who were at the top steps of their job classifications contradicted the terms of this proposal since these employees would only be able to receive merit increases solely at the discretion of their supervisors.[8]

After rejecting Respondent's 15 August proposal, the Union offered a proposal of a six percent ATB increase for all job classifications with a freeze on the hire-in rates at the current level. The Union further proposed that if

[8] The record establishes that 22 unit employees were at the top of their progression steps.

Respondent felt some employees deserved more in wages, Respondent should evaluate them in 6 months and if they were satisfactory, grant them an additional three percent increase. Respondent rejected the Union's proposal, stating that it needed to look at the senior employees and their long service. Further, Respondent objected to having any limitation on the merit increases or being locked into a three percent increase later. The Union sought to determine what amount the Respondent had put aside for the merit increases and Gibson informed the Union there was no "merit kitty." He stated Respondent had not set aside a designated amount for the merit increases.

Fifth Bargaining Session—20 August

In this session the Respondent formally rejected the Union's proposal of a six percent ATB increase with an additional three percent in 6 months for those employees who Respondent determined were worthy of additional wages. Gibson informed the Union representatives that a merit system was the only one Respondent would accept. He stated that the best contributors (employees) should get the most money. The Union then proposed that Respondent grant an across-the-board wage increase and get rid of any unproductive employees. Shaputis suggested the Respondent allow the employees to choose between the across-the-board and merit proposals. Gibson responded that Respondent did not want to put a number on the merit increases which would limit it. He also stated that the parties had a third alternative which was to do nothing with the existing wage structure.

Sixth Bargaining Session—21 August

At this bargaining sesion Respondent continued to insist that it would only accept a merit system for wage increases. However, Gibson now proposed that the merit reviews be determined by the appropriate division head and Respondent's president rather than by the supervisors

of the employees. The Union objected to Respondent's proposal and stated that it would cause conflicts between employees vying for wage increases. The Union representatives asked Respondent to submit two proposals and let the employees decide which one they preferred; one for an ATB wage increase and the other for a merit system wage increase. Gibson refused, stating, "It's not a good way." He told the Union representatives Respondent would only submit one proposal and that it would be a merit system proposal.

The parties met again that afternoon. Respondent submitted another written proposal to the Union representatives. (See Joint Exhibit No. 7). In this proposal, Respondent retained the existing progression steps for each job classification and proposed that the existing wage structure continue as the minimum wage rates. Respondent's proposal established merit increases as the means for employee wage increases and provided that the frequency and the amount of the merit increases would be determined by the appropriate division head and Respondent's president. The proposal submitted by Respondent adhered to Respondent's prior position that the merit increases would not be subject to the contract grievance procedure. The Union representatives rejected Respondent's proposal as being less than the last written offer submitted by Respondent. The Union countered with a proposal for an ATB increase or an ATB increase coupled with a merit system.[9]

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[9] Respondent's president, Girts Krumins, testified that in the initial stages of the negotiations, Respondent's merit increase proposal was in an embryonic stage. It basically included minimum and maximum wage rates with no progression steps for each job classification. As the negotiations progressed and Respondent took into account the Union's objections to its proposal, Respondent began to refine the details of its merit increase plan. Thus, according to Krumins, Respondent proposed to retain the progression steps for each job classification and eliminate the first-line supervisors as the individuals who determined when merit increases would be granted to the employees.

Seventh Bargaining Session—22 August

When the parties met, the Union again proposed a combination of an ATB increase coupled with some form of a merit increase for deserving employees. Respondent rejected this offer and Gibson questioned whether the parties were at an impasse. Shaputis replied they were not and stated, "There are all kinds of ways to go, but you only want one way."

The parties met again in the afternoon and Krumins, Respondent's president, participated in the negotiations. Krumins told the Union negotiators that Respondent was paying its clerical employees higher wages than existed in the labor market in which Respondent operated. He stated Respondent's customers were in agriculture and mining, and these business were currently experiencing serious financial problems. Krumins stated Respondent had to maintain the stability of its prices and this could only be accomplished by more efficient productivity. Since management's support employees (office and clerical employees) were essential to promoting overall productivity, Krumins insisted management wanted to reward this group by merit increases which recognized more than minimum contractual performance. Krumins also reminded the Union negotiators that under the terms of the agreement covering the operations and maintenance employees, Respondent was permitted to pay those employees above the contract rates based on a merit decision by management.

After Krumins spoke to the Union negotiators, Gibson presented them with another written proposal. (See Joint Exhibit No. 8). He stated this was Respondent's final offer. In this proposal, Respondent maintained the existing progression steps as the minimum hourly rates effective 9 September. The proposal also sought to install a merit system program effective the same date. The increases were to be determined by management and ap-

proved by Respondent's president and they were to be based on an employee's performance. Finally, the merit increases were not to be subject to the contract grievance procedure. The Union rejected this proposal, stating it was no different from the proposal submitted by Respondent on 15 August. The Union representatives suggested that the parties secure assistance from a federal mediator. Gibson again at this point asked if the parties had not reached an impasse. The Union representatives denied the parties were at an impasse. They contended the Respondent had not compromised in any way. Respondent insisted, on the other hand, that it was offering the Union a minimum hourly wage with no locked-in maximum. Respondent's representatives maintained this system was necessary to enable Respondent to reward productivity.

Eighth Bargaining Session—29 August

A federal mediator met with the parties at this session. In addition, Kermit Dacus, an international representative of the Union, joined the Union's bargaining committee. Jones informed Respondent's representatives that the unit employees had met and rejected Respondent's merit increase proposal. She stated 49 employees signed a petition supporting the Union's ATB wage increase request. Joens then submitted a new Union proposal calling for a four percent wage increase for all job classifications. Gibson rejected the Union's offer on the ground that it provided everyone with a flat amount. He asserted Respondent's rate-payers would object. Respondent continued to insist on a merit increase program. Gibson offered a one-time payment of $100 to each unit employee if the Union accepted Respondent's merit system. The Union rejected this offer, saying it only amounted to an increase of .0066 percent for each employee.

Ninth Bargaining Session—30 August

The Union representatives formally rejected Respondent's one-time payment of $100 to each employee. The Union representatives also took issue with the propriety of negotiating Respondent's merit increase proposal. The Union accused Respondent of attempting to change the contract wage structure. According to the Union representatives, this was not the proper subject of a wage reopener but, rather, belonged in general negotiations for an entire collective-bargaining agreement. Respondent rejected the Union's contention concerning the impropriety of its merit system proposal.

Tenth Bargaining Session—5 September

The parties met again with the federal mediator on 5 September. Respondent formally rejected the Union's proposal for a four percent ATB increase. (See Joint Exhibit No. 10). The Union then proposed the parties leave the wage structure as it was in the existing agreement and Respondent make a one-time payment of $1,000 to each unit employee. Respondent rejected this proposal outright.

Gibson presented the Union representatives with a copy of Respondent's latest proposal. This document was entitled "Final Company Offer." (See Joint Exhibit No. 11). Respondent's latest proposal also incorporated the progression steps of the existing agreement as the minimum hourly rates for each job classification and provided for a merit increase program. The amount and frequency of the merit increases were to be determined by the appropriate division head and Respondent's president. As with the prior proposals submitted by Respondent, this proposal stated the amount and frequency of the merit increases were not subject to the grievance procedure. The offer by Respondent contained the statement that if it were rejected, Respondent "reserve[d] the right to 'impasse' its proposal."

The Union made a counter-proposal calling for a four percent ATB increase while freezing the first six-month hire-in rate. The Union's counter-proposal also granted Respondent the right to move any employee upward through "accelerated progression" in the wage steps. This accelerated progression was to be in effect on a trial basis for a period of one year. (See Joint Exhibit No. 12). Respondent rejected the Union's counter-offer and stood by its final proposal. Gibson requested that the Union representatives take its proposal back to the membership for a vote.

2. The Continuing Negotiations and Respondent's Implementation of its Final Wage Proposal

The record discloses that after the bargaining session on 5 September, the Union representatives submitted Respondent's final offer to the unit employees. The employees rejected Respondent's proposal and Shaputis notified Gibson of this action. On 12 September, Gibson wrote to Joens and informed the Union representative that Respondent considered an impasse to exist regarding the wage negotiations. He notified Joens that Respondent would implement its final wage proposal on 23 September. (See Joint Exhibit No. 13). Mason sent a Mailgram to Respondent requesting further negotiations commencing 17 September. (See Joint Exhibit No. 14).

On 18 September, the unit employees engaged in a strike against Respondent and began picketing Respondent's facilities. Although the strike was in protest of the failure to come to an agreement on wages for the office and clerical employees, many of the operations and maintenance employees supported the strike and engaged in picketing.

During the strike, the Union maintained a telephone "hot line" at its office to keep callers informed about the status of the negotiations. Gibson's undisputed testimony discloses that he called the "hot line" on two occasions;

20 and 24 September. In response to the first call, he received a message recorded by Mason. This message stated the Union would submit another wage offer to Respondent "to resolve the impasse" in a peaceful manner. The 24 September message, also by Mason, stated that Respondent had rejected the Union's proposal for "resolving the impasse."

Eleventh Bargaining Session—18 September

The parties met on 18 September and Mason became the chief spokesperson for the Union. The mediator was not present at this meeting. Gibson handed a letter to the Union representatives in which he referred to a statement by Shaputis that the Union had a proposal to break the impasse in the negotiations.[10] (See Joint Exhibit No. 15). The bargaining notes reveal that Respondent adhered to its final proposal of 5 September and again advised the Union representatives that it would implement the terms of this proposal on 23 September. At this meeting, Dacus stated Respondent's merit increase proposal had "deadlocked" the negotiations. Gibson rejected the Union's offer of a four percent ATB increase and asked the Union to submit another proposal. Respondent's bargaining notes indicate that Mason responded to this request by stating, "Hell no, we won't give you a proposal."

Twelfth Bargaining Session—19 September

The parties met with the federal mediator on this date. The Union insisted on its four percent ATB wage proposal and Respondent continued to adhere to its merit increase proposal of 5 September. Respondent also continued to assert its intention to implement the merit program on 23 September.

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[10] According to Gibson, the Union representatives took the position that the strike broke the bargaining impasse.

Thirteenth Bargaining Session—20 September

The parties did not meet face-to-face on this date but submitted proposals to each other through the mediator. The Union submitted a written offer for "breaking the impasse and ending the strike." (See Joint Exhibit No. 17). The Union's proposal offered several options: (1) Submit the wage proposals of both parties to an arbitrator with instructions that the arbitrator was to choose one or the other; (2) submit both proposals to an arbitrator who would have latitude to construct a "fair and equitable" wage agreement; and (3) Krumins to meet with the unit employees, with Union representatives present, to explain Respondent's wage offer and the parties would be bound by a secret-ballot vote of the unit employees accepting or rejecting Respondent's wage proposal. The strike settlement offer proposed by the Union was rejected by Respondent.

Fourteenth Bargaining Session—27 September

This meeting was called by the federal mediator. Gibson gave the Union representatives a tabulation showing the first merit increases implemented by Respondent. The performance standards utilized by Respondent during the merit reviews were individual job performance and contribution on the job. (See Joint Exhibit No. 21).[11] No additional proposals were submitted by either party at this meeting.

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[11] In a subsequent communication to the unit employees on 28 September, Respondent summarized the results of the initial implementation of its merit review program. Respondent noted that there were 72 unit employees and merit reviews had been given to 47 of them. Of this number, 44 received merit increases and 3 employees received no increase after the merit review. The merit increases ranged from 4 percent to 8.5 percent and the average increase for the employees was 5.6 percent. In this communication Respondent informed the employees that the remaining 25 employees would be reviewed within 90 days. (See Joint Exhibit No. 22).

Fifteenth Bargaining Session—3 October

The parties met at the request of the mediator. The Union representatives asked for the basis on which Respondent's officials decided whether an employee was entitled to a merit increase. Gibson responded that it was a management function and the criteria used was job performance and contribution on the job as determined by the division heads and Respondent's president. The Union representatives complained that the standards applied by Respondent were purely subjective.

The Union submitted another wage proposal to Respondent at this meeting. This latest Union proposal called for a 3.5 percent ATB increase effective 8 September, with the mployees who had received merit increases retaining those increases. Any employees not reviewed within 90 days of 23 September would be reviewed and given increases consistent with the increases granted on 23 September. The Union proposal called for the creation of an Incentive Raise Committee, composed of three Union and three management representatives, to devise the manner and means by which merit increases would be granted in the future and how disagreements would be resolved. (See Joint Exhibit No. 23). The Union also orally requested that a written summary be given after each employee's merit review. Respondent rejected the Union's proposal. Gibson indicated, however, that Respondent could possibly accept the Union's request that everyone reviewed would retain the wage increases as proposed by Respondent. Further, that Respondent would agree to review the balance of the employees within 90 days of 23 September and grant increases on the same basis as the initial increases.

Later during this same meeting Respondent submitted another written proposal to the Union. This proposal contained the same terms as Respondent's 5 September offer in that the current progression steps constituted the minimum hourly wages and merit increases were based

on job performance and contribution on the job. As in the prior offer, the amount and frequency of the merit increases were to be determined by the division heads and Respondent's president and were not subject to the grievance procedure. In addition, however, Respondent offered a one-time payment of $100 to unit employees not receiving a merit increase between 23 September and 20 December; payment of this one-time amount was to be made on or before 31 December. (See Joint Exhibit No. 24). Respondent also proposed mutual releases by the parties for actions arising out of the strike and an agreement not to take any action against striking employees or employees who crossed the picket line. (See Joint Exhibit No. 25).

Sixteenth Bargaining Session—4 October

When the parties met, the Union representatives rejected Respondent's offer of the prior day. The Union objected because there was no provision for grieving the merit increases and there was no Union input regarding the standards to be used in the merit reviews.

The Union submitted a new proposal asking for 8.5 percent ATB increases effective 8 September and the establishment of an Incentive Raise Committee. This committee was to develop objective criteria for merit increases and the manner in which disagreements would be resolved. (See Joint Exhibit No. 26). Respondent rejected this latest offer from the Union.

As the meeting progressed, the Union submitted another offer which consisted of two options "for breaking the impasse and ending the strike." (See Joint Exhibit No. 27). This proposal involved interest arbitration and the first option required submission of Respondent's last and final offer and the last offer of the Union to an arbtirator to choose between the two. The second option entailed the submission of the last offers of the parties to an arbitrator to fashion a "fair and equitable" wage agreement. Resondent also rejected this proposal.

The parties did not meet again until 5 November. In the interim, Gibson forward a report to the Union indicating that Respondent had completed the merit reviews of all of the remaining unit employees. The report revealed that 26 employees were reviewed and 25 received merit increases ranging from 3 to 8 percent. The average increase was 5.14 percent. (See Joint Exhibit No. 28).

Seventeenth Bargaining Session—5 November

Shaputis became the chief spokesperson for the Union at this meeting. The Union orally proposed that Respondent grant a 4 percent ATB increase in 1984 and a 5 percent ATB increase in 1985. The Union also requested that a joint committee be set up to design a merit increase program and develop the criteria which would be used in granting these increases. The product of the committee's work would be the subject of negotiations in 1986. The Union representations indicated that the Union preferred not to have any merit increases at all, but was willing for the parties to establish a joint committee to develop the standards for a merit program.

Eighteenth Bargaining Session—6 November

At this meeting, the Respondent rejected the Union's oral proposal of 5 November. Gibson stated that across-the-board increases did not solve the problems of the longer service employees. He told the Union representatives that the Respondent would not lock in 1985 wage increases in the current negotiations. He further stated that there was no need to establish an incentive raise committee because Respondent had already developed the guidelines for the merit program. When the Union representatives protested this was after the fact and that Respondent never gave the guidelines to the Union in advance, Gibson stated that job performance and contribution on the job were the criteria of the merit program. The Union continued to press for specific guide-

lines in judging whether an employee deserved a merit increase and Gibson informed them that Respondent's guidelines had already been stated. The parties agreed at this meeting that Krumins would meet with unit employees on 13 November to explain how the merit increase program worked.[12]

Nineteenth Bargaining Session—7 November

As this meeting the parties devoted their discussion to the Union's proposal for the establishment of a joint committee to study and develop a merit increase plan with an appeals procedure. The Union representatives were urging a process whereby it would have some representational input when an employee felt his or her merit was not fair or just. No agreement was reached during these discussions.

Twentieth Bargaining Session—5 December

Gibson presented another written proposal to the Union representatives at this meeting. In this proposal, Respondent offered a 4 percent increase in the step progressions for all classifications effective 15 September 1985 and the elimination of the first 6-month hire-in rate. Respondent proposed that each employee receive at least one merit review between 23 September 1984 and 14 September 1985 and at least one other between 15 September 1985 and 16 September 1986. Respondent continued to insist that the amount and frequency of the merit increases would be determined by the appropriate department head and Respondent's president and would not be

[12] The record reveals that on 13 November, Krumins met at Respondent's headquarters with the unit employees from all of Respondent's facilities. Representatives from the Union were present during this meeting. Krumins explained the operation of the merit increase program to the employees. During this meeting, Krumins informed the employees that Respondent was no longer using the "MSL" ratings (more than satisfactory, satisfactory, and less than satisfactory) on the merit increase notifications.

subject to the contract grievance procedure. Respondent proposed that in the event an employe took issue with the results of the merit review, the employee could request a meeting with Respondent's president and could have a Union representative present at the meeting. (See Joint Exhibit No. 30).

Although the Union representatives found some parts of Respondent's proposal to be acceptable, they rejected other portions and made a counter-offer. The Union representatives asked for a 4 percent increase in the step progressions effective 8 September 1984 and another 4 percent the following year. The Union representatives also requested that employees receive a written summary of their evaluations when undergoing a merit review, and that the summaries contained provisions for the reviewed employees to agree or disagree with the evaluation and the reasons for their position.

Respondent countered with another offer which rejected the written summary during merit reviews. Gibson stated employees could appeal directly to Respondent's president and have a Union representative present during the appeal. Respondent also offered a 2 percent increase in the step progressions effective 6 January 1985 and an additional 3 percent effective 15 September 1985.

Twenty-First Bargaining Sessions—6 December

At this meeting, the Union representatives sought to discuss the need for summaries of the merit evaluations and the criteria used by Respondent's officials in evaluating the employees. The Union representatives proposed that the merit system utilized by Respondent become null and void at the end of the contract term. They also proposed that once an employee was granted a merit increase, there would be "no take aways" to reduce that employee's rate. The Union negotiators requested that Respondent grant a 3.5 percent increase in the progression steps effective 6 January 1985 and an additional 4

percent increase on 15 September 1985. The Union representatives contended these increases would not affect any employees currently on the payroll, since they were less than the increases the employees had already received.

In the afternoon, Respondent rejected the Union's proposal stating that there would be no written summaries given to employees during their merit reviews, Gibson assured the Union that Respondent would not use any form of take aways to reduce any merit increase granted an employee. Respondent rejected the Union's proposal for the percentage increases in January and September. Gibson submitted a new written offer to the Union. In this offer, the Company proposed to increase the progression steps in all classifications by 2 percent effective 6 January 1985 and by 3 percent effective 15 September 1985. As with its last proposal, Respondent proposed to eliminate the first 6-month hire-in rate from the progression steps. In addition, the Respondent continued to insist that the amount and frequency of the merit increases would be determined by the appropriate division head and Respondent's president and not be subject to the contract grievance procedure. Respondent's proposal also contained a provision that if an employee felt improperly treated during a merit review, the employee could appeal directly to Respondent's president and could have a Union representative present during the meeting. (See Joint Exhibit No. 31). Gibson told the Union representatives that Respondent had already granted employees merit increases exceeding 5 percent and that there were no more negotiated monies available for the employees.

The Union representatives countered with a proposal of a 3 percent increase in January in the progression steps and an additional 4 percent in September 1985. The Union representatives also continued to insist that employees be provided a written summary of their merit reviews. Gibson rejected the idea of written summaries

and proposed that if the Union accepted the Respondent's offer, a one-time cash payment of $100 would be given to each unit employee when the agreement was ratified. The Union representatives rejected Respondent's proposals.

Twenty-Second Bargaining Session—26 March 1985 [13]

The Union continued to request that a joint committee be established to define Respondent's merit review criteria. They also wanted documentation concerning the guidelines followed by management in the merit reviews and what the merit reviews themselves entailed. Additionally, the Union representatives sought to have the merit program subject to the grievance and arbitration procedure of the collective-bargaining agreement. Gibson took the position that employees could grieve only if they did not receive the contract minimum rates for their job classifications. He offered to submit a new wage proposal to the Union on the following day.

Twenty-Third Bargaining Session—27 March 1985

Respondent gave a new wage offer to the Union representatives at this meeting. Similar to the prior proposals, this proposal was a combination of increases in the step progressions for each job classification and the Respondent's already instituted merit increase program. Respondent offered a 4 percent increase in the wage steps effective 30 June 1985. It dropped the language that stated the amount and frequency of the merit reviews was not subject to the grievance procedure of the collective-bargaining agreement. In its place, Respondent pro-

[13] The parties met on 26 and 27 March 1985. Although the bargaining notes and the written proposal presented by Respondent at these sessions are part of the Joint Exhibits, the General Counsel argues the testimony and documents relating to these meetings are not relevant to the allegations of the complaint. The argument of the General Counsel in this regard was rejected and these meetings are set forth to provide the complete factual account of the wage negotiations between the parties.

vided the amount and frequency would be at the sole discretion of the employer and determined by Respondent's president and the employee's division head. It also provided for employee appeal from the results of the merit review directly to Respondent's president and permitted the employee to have an appropriate Union representative present during the appeal. (See Respondent Exhibit No. 3). Gibson took the position at this meeting that if merit reviews were not granted within the stated time periods, this would be subject to the contract grievance procedure. However, the amount and frequency of the merit reviews was not subject to the grievance procedure.

In the afternoon meeting of this bargaining session, Respondent submitted another written proposal to the Union. The sole difference between this proposal and the one presented in the morning was that Respondent now proposed to increase the progression steps by 2 percent effective 16 December 1984 and 2 percent effective 16 June 1985. (See Joint Exhibit No. 36). The meeting concluded with the parties unable to resolve their differences.

B. *The Alleged Direct Dealing with a Unit Employee*

Joan Deskin (Hiss) was a union steward at the Craig facility and during the negotiations, she was a member of the Union's bargaining committee.[14] According to the undisputed testimony, Hiss contacted Krumins on 8 October and requested that he come to Craig to explain Respondent's merit program to the unit employees there. Krumins met with the employees at Craig on 14 October. In explaining the operation of Respondent's merit increase program, Krumins told the employees it was possible for management to grant an employee a merit increase at the same time the employee received a pro-

[14] During the events set forth here, Hiss was not married and all references in the record are in terms of her maiden name. At the time of the hearing, she was no longer a union steward.

gression step increase. During the discussion with the employees, Hiss informed Krumins that the merit increase she received on 23 September was not fair. Krumins asked Hiss to meet separately with him after the meeting.

When Krumins and Hiss met, Hiss complained about the amount of her merit increase.[15] Hiss itemized the duties she performed on the job and Krumins stated he was not aware of a number of the things she had indicated. According to Hiss, Krumins told her to wait until her next step increase.[16] Hiss agreed but advised Krumins that if she were not satisfied, she would contact him again.

The unrefuted testimony establishes that Hiss received a progression step increase as well as an additional merit increase in January 1985. The total wage increase received by Hiss amounted to 8 percent. Hiss spoke to her supervisor and asked if the increase were not too high. Her supervisor replied that he did not think so but that he had nothing to do with the amount, since the decision was made in Montrose (Respondent's headquarters).

C. *The Incidents During the Strike*

As noted, when the unit employees went on strike over the wage negotiations, many operations and maintenance employees engaged in a sympathy strike and picketed with them. Clarence Koch, a plant vehicle maintenance mechanic at the Hayden facility, was one of these employees. Koch testified that on 18 September, he was on the picket line when he saw his supervisor, James Squires, driving an ash truck into the plant. Koch stopped

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[15] The documents the Respondent submitted to the Union indicate that Hiss received a 4 percent merit increase on 23 September. (See Joint Exhibit No. 21).

[16] Krumins testimony regarding this statement differs somewhat from that of Hiss. Krumins stated he told Hiss that she would be reviewed again at the time of her next step increase.

Squires and climbed on the running board of the truck to speak with him.[17] Koch asked Squires how things were going and Squires complained he was tired from working so hard. Koch then asked who was doing the diesel mechanic work and Squires responded that he was hoping Koch would do it. According to Koch, when he replied he could not because he was on strike, Squires said the employee could resign from the Union and Respondent would pay him $24 an hour for a 12-hour day for seven days a week.[18] Koch indicated that the Union would fine him more than he would make, if he returned to work during the strike. Koch testified Squires then told him the Union could not fine him if he resigned.

Squires admitted having a conversation with Koch on this date. He also admitted he told the employee he was working 12 hours a day 7 days week at double time. Squires stated he spoke to Koch as a friend and had not been authorized by anyone in management to make any offer to Koch to abandon the strike and return to work. Squires acknowledged he told Koch he could return to work if he secured a lawyer and took the proper steps to resign from the Union. He was unable to recall whether he told Koch that the employee would earn double time and work 7 days a week if he returned to work.

The second incident alleged to have occurred during the strike also involved Koch. On 24 September, while on picket line duty, Koch was instructed by the strike captain to follow a bus which Respondent used to transport employees to and from their homes to the Hayden facility during the strike. Koch's mission was to check the bus when it discharged passengers to see if any union employees were working during the strike. The undisputed testimony reveals that strikers reguarly were as-

[17] Koch and Squires were friends and normally rode to and from work together in a carpool.

[18] At the time of the strike, Koch was earning $12.34 an hour and working a 40-hour week.

signed to trail Respondent's bus for this purpose when it left the plant. It is also undisputed that in trailing the bus Koch did not drive dangerously or attempt to interfere in any manner with the progress of the bus; nor did he make any threatening gestures toward the occupants or engage in conduct which would attract attention to the fact that he was following the bus. His wife, Linda, and striking employee Penny Libby were in the automobile with Koch at the time.

When the bus stopped at a parking lot at a Holiday Inn in Craig (approximately 7:40 p.m.), a male got out and came over to the driver's side of Koch's car and spoke through the window. According to Koch, the individual stated, "You asshole, if you think you're going to follow this bus and find out where I live, you've got another thought coming." Kock replied he was no asshole and neither was the individual who was confronting him. Koch asserted that it was a public highway and he could drive where he wanted. The man then told Koch he knew who he was and that he would watch Koch's schedule and "would get him when this is over." The individual then returned to the bus. Libby, who was sitting in the rear of Koch's car, identified the individual as John Rudisaile, a fuels supervisor at the plant. Libby lived on the same street as Rudisaile and dealt directly with him on several occasions during the course of her work at the Hayden plant. After the incident, Koch took Libby to her home.[19] Koch notified the Union officials of the incident with Rudisaile.

Koch was contacted by a co-worker, Jeffery Crawford, the following day concerning the confrontation with Rudisaile. Koch was told by Crawford that Rudisaile had called Crawford's home the night before asking if Crawford could contact Koch. Crawford stated Rudisaile explained that he had "blown up" at Koch and wanted to

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[19] Both Libby and Linda Koch corroborated Koch's testimony as to the conversation that took place with Rudisaile.

apologize to him. In explaining the incident to Crawford, Rudisaile said he though Koch might be a burglar. Both Crawford and Koch testified they dismissed this explanation after Koch informed Crawford that Libby was in Koch's automobile at the time.

Rudisaile admitted confronting Koch in the Holiday Inn parking lot. He also admitted on cross-examination that after the inception of the strike, strikers in automobiles followed Respondent's bus every evening as it left the Hayden facility. In explaining why he accosted Koch in the parking lot, Rudisaile stated that an automobile followed Respondent's bus the evening before when he was being taken home. He testified that when he was let off at his street, he became concerned and went to the home of a neighbor. After the automobile left, he then went to his own home. According to Rudisaile, later that same evening, the neighbor informed him that someone with a knife appeared at his door and the neighbor called the police. Rudisaile also admitted, on cross-examination, that when Koch's automobile was identified by the occupants of the bus on the night of the incident, they were no longer concerned about being followed because they felt they had nothing to fear from Koch.

Charles Hogue, station superintendent of the Hayden facility, testified that prior to the strike he met with all of his managers and supervisors and explained what their conduct was to be during the strike. Hogue stated he instructed them not to converse with the striking employees and to pass through the picket lines "as low key" as possible. Hogue further testified that management did not authorize any of the supervisors or management employees to offer strikers higher wages to return to work; nor were they to threaten any of the striking employees.[20] Hogue further testified that after he

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[20] Krumins also testified that management was specifically instructed not to talk to the strikers on the picket lines or to make any offers to them.

was made aware of the incidents involving Koch and the two supervisors, he held another meeting with all of his managers and supervisors. He repeated his prior instructions that the supervisors and managers were not to converse with or make any offers to the picketing employees.

Concluding Findings

A. *The Bad Faith and Surface Bargaining Issues*

Counsel for the General Counsel and Charging Party argue, with some degree of persuasiveness, that the merit increase proposal itself and Respondent's unyielding insistence on this method of a wage increase demonstrate Respondent was engaging in lengthy negotiations without an intent to reach an agreement with the Union on the wage issue. Further, they contend the merit proposal, coupled with Respondent's negotiating posture at the bargaining table, the unilateral implementation of the merit program (assertedly without having reached a valid bargaining impasse), and the incident of direct dealing with an employee regarding her wage increase all establish that Respondent was not bargaining in good faith with the Union. The principal contention underlying these arguments is that Respondent's merit increase program completely excluded the Union from exercising any representational participation, whatsoever, in this most vital area of the employment relationship; namely, wages of the unit employees.

In support of their arguments, the General Counsel and Charging Party rely heavily on several Board decisions in which, unlike the instant cases, the parties were negotiating for a complete collective-bargaining agreement, but where the employers were insisting on an unfettered right to grant merit increases at their sole discretion.[21] See *Smythe Manufacturing Company*, 247

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[21] General Counsel contends that the evidence of bad faith is more graphically demonstrated in the instant matter; since the parties

NLRB 1139 (1980) (employer rigidly insisting on an open shop provision, a grievance procedure which severely limited the union's role, and a merit wage increase system which completely excluded the union from any participation in its operation); *Struthers Wells Corporation*, 262 NLRB 1080 (1982) (employer insisting on altering jurisdictional clause to permit it to deny recognition of union as representative of employees performing unit work, insisting on a merit increase program at employer's sole discretion, and insisting on elimination of posting and bidding procedures to permit it to unilaterally control promotions), enfd. as modified, 712 F.2d 465 (3rd Cir. 1983); *A-1 King Size Sandwiches*, 265 NLRB 850 (1982) (employer insisting on merit increase program at its sole discretion with no recourse to the union because of employer's insistence on broad management rights and no strike provisions. Also, insistence on removal of discharge, discipline, lay off and recall provisions from contract grievance and arbitration procedure), enfd. 732 F.2d 872 (11th Cir. 1984).

Respondent contends, in an equally persuasive manner, that it was legitimately seeking a two-tier wage structure consisting of guaranteed minimum wages and a merit increase system. Respondent argues that neither the wage proposal itself nor its conduct during the negotiating establish Respondent was negotiating in bad faith or going through the motions of bargaining without an intent to reach an agreement. In support of this argument, Respondent asserts that its proposals were not "demonstrably unreasonable", that it explained to the Union the underlying reasons for its wage proposal position, and that it met diligently with the Union in an effort to resolve their differences. All of this, Respondent argues, demonstrates that it was not engaging in surface or bad

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here were focusing only on one issue—wages—as opposed to bargaining over numerous issues in a complete collective-bargaining agreement.

faith bargaining but, rather, that it was employing hard bargaining tactics to achieve its negotiation objectives.

Cases of this nature, involving allegations of bad faith and surface bargaining during negotiations, are not easily resolved. The line of demarcation between hard bargaining and surface bargaining is neither bright nor well defined. The boundaries of the bargaining obligation, however, are well established and it is within this framework that the particular facts of each case must be considered.

As the Supreme Court long ago stated, "The Board [in determning whether the statutory bargaining obligation has been satisfied] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). The Court also recognized that in ascertaining whether good faith bargaining occurred during negotiations, "the Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement", and that this determination is made by "drawing inferences from the conduct of the parties as a whole." *NLRB v. Insurance Agents Union*, 361 U.S. 477, 498 (1960). See also, *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972). Thus, it is necessary to consider the totality of the circumstances in each case to determine whether the good faith bargaining obligations has been met.

In keeping with these principles, the Board in recent decisions stated, "It is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." *Rescar, Inc.*, 274 NLRB No. 1 (sl. op. 13 February 1985). Also, *Reichhold Chemicals, Inc.*, 277 NLRB No. 73 (sl. op. 22

November 1985). In spite of this language, however, the cases demonstrate the Board does, with Court sanction, consider the content of bargaining proposals in evaluating the total circumstances when determining whether good faith bargaining has occurred during contract negotiations. *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984); *Chevron Chemical Company*, 261 NLRB 44, 46 (1982); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1225-26 (9th Cir. 1981); *Pease Company v. NLRB*, 666 F.2d 1044 (6th Cir. 1981); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).[22]

In the *Wright Motors* case, the court pointedly articulated one of the foremost reasons why it is necessary to consider the bargaining proposals when determining whether parties are bargaining in good faith. There, while affirming the caveat "that neither the Board nor the courts should sit in judgment on the substantive terms offered by parties negotiating in good faith," the court went on to state:[23]

> "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. [Citations omitted.] The fact that it may be difficult to distinguish bad faith bargaining from hard bargaining cannot excuse our obligation to do so."

Considering all of the circumstances deevloped in the record and applying the principals set forth above, I con-

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[22] In a recent decision, the Board specifically noted that unreasonable bargaining demands during negotiations constitute an example of conduct demonstrating lack of good faith. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

[23] *NLRB v. Wright Motors*, 603 F.2d at 609-10.

clude the record evidence does not warrant a finding that Respondent bargained in bad faith or engaged in negotiations without intent to reach an agreement with the Union on the wage issue. Rather, the facts here demonstrate Respondent engaged in hard bargaining and adhered to a legitimately held position during the wage-reopener negotiations.

It is readily apparent from the outset of the negotiations that the Union was insisting on across-the-board (ATB) wage increases. It is equally apparent Respondent was insistant on instituting a merit system whereby employees would receive wage increases at times and in amounts determined solely by management, and the exercise of this discretion would not be subject to the contract grievance procedure. The fact that Respondent's merit system proposal was unacceptable to the Union because it eliminated the Union from any effective representational participation in its operation does not, standing alone, indicate Respondent was bargaining in bad faith. As the Court noted in the *Pease Company* case, "a lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable. . . ." [24] Nor does the fact that Respondent was insisting that the operation of the merit increase system be removed from the contract grievance procedure evidence a lack of good faith. The mere insisting on concessions which limit the representational function of a union in some respects does not, without more, establish bad faith in collective bargaining. *Reichhold Chemicals, Inc., supra*; Cf. *N.L.R.B. v. Tomco Communications, Inc., supra*, at 613.

While Respondent's merit increase proposal, initially and as modified during the negotiations, may be deemed harsh from the Union's perspective, it was not "so unusually harsh, vindictive, or unreasonable" so as to warrant

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[24] *Pease Company v. N.L.R.B.*, 567 F.2d at 1049.

the conclusion that it was offered in bad faith. *Chevron Chemical Company, supra*, at 46. The Union's negotiators were informed initially, and throughout the numerous bargaining sessions, of the reasons why Respondent was insisting on a merit increase program: (1) it wanted to be able to reward those employees whose job performance exceeded the norm; and (2) it wanted to correct the inequities an ATB increase would have on the overall increases received by employees at the top of their wage steps. Furthermore, at no time during the negotiations did Respondent seek to reduce the current level of employee wages.[25] When Respondent presented its initial written proposal to the Union at the third bargaining session, it sought to eliminate the wage progression steps and substitute minimum, mid-level and maximum rates for each job classification. Examination of this initial proposal reveals that the minimum and mid-level rates offered by Respondent were extracted from the existing progression steps of the current collective-bargaining agreement and the maximum rates exceeded the top step rates by at least 3.5 percent. This constituted the bottom tier or the guaranteed rates for each job classification. All increases beyond these rates were to be subject to Respondent's merit program. In its subsequent proposals, commencing at the fifth bargaining session, Respondent abandoned its stand on the elimination of the progression steps and incorporated them in toto as the bottom tier for each successive wage proposal submitted to the Union during the negotiations. Thus, the record does not warrant an inference of bad faith from the terms of Respondent's merit increase proposal.

The next issue to be considered is whether Respondent's conduct demonstrates that it was engaging in negotiations

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[25] This is not to suggest that if Respondent were seeking wage reductions, it would necessarily warrant a finding of bad faith. However, that Respondent was not seeking such a reduction is a factor to be considered in assessing the total circumstances here.

without a sincere desire to resolve its differences with the Union and reach an agreement. In my judgment, the record does not support such a finding. To the contrary, the recital of the bargaining proposals and tactics employed by both parties throughout the lengthy negotiations graphically illustrates that the parties were engaging in the very process contemplated by the Act.

Respondent met with the Union during 23 lengthy bargaining sessions spanning a time frame from 31 July 1984, to 27 March 1985.[26] In eight of these sessions, the parties used the assistance of a federal mediator. The wage proposal submitted by Respondent and its bargaining posture throughout the negotiations were consistent with its stated bargaining objectives; i.e., to institute a wage structure which would combine a guaranteed minimum wage equal to the existing wages and a merit increase system based on management's sole discretion and not subject to the contract grievance procedure. Respondent's firm insistence on its wage proposal and its rejection of the Union's wage offers, including the numerous concessions made by the Union, do not establish that Respondent was negotiating without an intention of reaching an agreement with the Union. As the cases illustrate, a party may stand firm on a position it deems reasonable and fair and such insistence, of itself, does not constitute evidence of bad faith. *Atlanta Hilton & Tower*, *supra*, at 1603 (and the cases cited therein). See also *Hamady Bros. Food Markets, Inc.*, 275 NLRB No. 183 (sl. op. July 31, 1985); *Pease Co. v. N.L.R.B.*, *supra*, at 1049.

Thus, I find Respondent's conduct at the bargaining table embodied none of the characteristics that would indicate it was not sincerely attempting to reach an agreement with the Union on the wage issue. Its negotiator was vested with full authority and met diligently with the

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[26] The 23 bargaining sessions include the one sesssion on September 20 where the parties did not meet face-to-face but submitted proposals through the federal mediator.

Union negotiators through 23 bargaining sessions; Respondent's insistence on a wage package coupling guaranteed minimum wages with a merit increase program not subject to the grievance procedure was not unreasonable; the wage proposals offered by Respondent during the bargaining sessions, both prior and subsequent to the implementation of its 5 September final offer, were consistent; and Respondent did not engage in any deceptive practices or attempt to mislead the union negotiators in any manner during the bargaining sessions.

Nor does Respondent's conduct away from the bargaining table demonstrate that it was negotiating in bad faith. The General Counsel and Charging Party contend that Respondent's president, Krumins, engaged in direct dealing with employee Joan Hiss on 8 October concerning her wages and that as a result, Hiss subsequently received an 8 percent wage increase in January 1985. This factor is cited as evidence that Respondent was negotiating in bad faith and attempting to undermine the Union's representative status in order to discourage employee support for the Union. The record facts, however, do not support this contention, and I find that no inference of bad faith can be drawn from this incident.

Hiss was a union steward at the Craig facility and a member of the Union's negotiating team meeting. It was after Respondent implemented its 5 September final offer that she made the request from Krumins to come to the Craig facility and explain the operation of the merit increase program to the unit employees there. Following the meeting, Hiss complained privately to Krumins because she only received a 4 percent increase as a result of her merit review on 23 September. She also recited a number of duties she performed and Krumins acknowledged that he was not aware of all of this. Krumins neither promised Hiss an additional wage increase nor did he state a set amount that she could expect to receive. Krumins simply told the employee to wait until her next progression step increase and she would be reviewed again.

Contrary to the General Counsel and Charging Party, this incident does not establish that Respondent was engaging in direct dealing with Hiss. First of all, Hiss was the union steward and representative at the Craig facility. Her complaint regarding her wage increase as an employee cannot be divorced from her representative status as the union steward. Thus, Hiss the union steward was in fact representing Hiss the employee. Additionally, there is no evidence whatsoever that Krumins promised Hiss she would receive an additional merit increase at the time of her next step progression. He merely indicated to the employee that she would be reviewed at that time and suggested she wait until then. I find nothing here which suggests Krumins was negotiating individually with Hiss concerning her future wage increase. He simply informed the employee that she would undergo another merit review when she was entitled to her next increase. Therefore, I find that Krumins was not engaging in direct dealings with Hiss regarding her wages. Nor was his conduct such that it demonstrated he was attempting to bypass and undermine the Union during the negotiations.

In sum, I find the evidence of Respondent's overall conduct during the wage-reopener negotiations does not sustain an inference that Respondent was bargaining in bad faith. Rather, these circumstances more appropriately demonstrate Respondent was engaged in hard bargaining and was relying on its economic strength to achieve its bargaining objectives.

B. *The Impasse Issue*

General Counsel and Charging Party contend the parties had not bargained to a valid impasse on the wage provisions when Respondent implemented the terms of its final proposal on 23 September. In my judgment, the record evidence compels a contrary conclusion, and I find a valid impasse in negotiations had occurred when Respondent unilaterally implemented its wage proposal.

The case law is well established on this point. When an employer unilaterally changes a condition of employment that is a mandatory subject of bargaining, he violates the Act because he has circumvented the statutory duty to negotiate with the bargaining representative of his employees. *N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). Where the parties have reached a genuine impasse in negotiations, however, an employer is free to unilaterally implement changes in employment terms and conditions; provided those changes are reasonably consistent with the terms last offered to the Union during negotiations. *Id.* at 745; *Hamady Bros. Food Markets, Inc., supra; Western Publishing Co.*, 269 NLRB 355 (1984); *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. *sub. nom. AFTRA, Kansas City Local v. N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968). As the Board stated in *Taft Broadcasting*, the following factors are to be considered in determining whether parties have reached a genuine impasse in collective bargaining:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. . . .[27]

Applying these factors to the instant case, I find there was a genuine impasse in bargaining when Respondent implemented its last wage offer. Respondent's last wage proposal was submitted at the tenth bargaining session on 5 September. The record clearly demonstrates that throughout all of the bargaining sessions the Union was insisting on ATB increases and Respondent was equally

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[27] *Taft Broadcasting, supra*, at 478.

adamant that the wage structure consist of minimum contract wage rates for each job classification, with a merit increase program operated solely at management's discretion and not subject to the contract grievance procedure. During the course of the ten bargaining sessions, proposals and counterproposals were exchanged by the parties with no agreement on the central elements of either party's wage offers. The Union adhered to its ATB increase demand, although it progressively reduced the amount of the increase, and Respondent firmly adhered to its minimum guaranteed wages with a purely discretionary merit increase system.

While concessions were made by both sides, there was no retreat by either on the type of wage increase that ultimately would be put into effect. For example, by 5 September, the Union had reduced its initial ATB demand in graduated amounts from 9 percent to 4 percent and proposed a freeze on the level of the initial hire-in rates of new employees. At one bargaining session, the Union also proposed combining ATB increases with some form of a merit system which permitted Respondent to reward deserving employees by accelerated movement through the progression steps. Respondent changed its initial proposal so that first-line supervisors were removed from the operation of the merit increase program and the discretion (as to when and in what amounts increases would be granted) was vested in the appropriate division head and Respondent's president. Respondent also abandoned its initial efforts to eliminate the current wage steps as the minimum contract wage rates. Finally, Respondent offered a one-time payment of $100 to each unit employee if the Union accepted its merit increase proposal. These concessions, however, failed to cause any movement by either party on the central issue dividing them; i.e., the Union's demand for ATB wage increases and Respondent's adamant insistence on a wage structure consisting of minimum guaranteed wage rates and the discretionary merit increase system.

Thus, it is evident that when Respondent's final offer was rejected on 5 September the parties were deadlocked in their negotiations. They had met diligently over the course of ten lengthy bargaining sessions, utilizing the assistance of a federal mediator in several. The sole issue of their negotiations was the wage proposal and at the time of Respondent's final offer on 5 September, they were as divided on this issue as they were when negotiations began on 31 July. Furthermore, their subsequent meetings on 18 and 20 September—prior to the date Respondent unilaterally implemented the terms of its final offer—failed to break this deadlock.

That an impasse existed at this point is even more clearly reflected by the evidence showing the understanding of the parties themselves. After the Union rejected Respondent's final wage proposal of 5 September, Gibson's letter to Joens on 12 September clearly indicated Respondent considered the negotiations to be deadlocked. Although this view would be considered self-serving if only expressed by Respondent, the record reveals this was also the understanding shared by the union negotiators. When the parties met on 18 September, the unrefuted evidence establishes that the meeting was initiated by union representative Shaputis, who informed Gibson that the Union had a proposal "to break the impasse." Further evidence that the union representatives considered the negotiations deadlocked is found in the recorded messages made by Mason on the Union's "hot line" to keep employees informed about the status of the negotiations. The unrefuted testimony establishes that Mason's message on 20 September stated the Union would make another wage offer to Respondent in order to "resolve the impasse" in a peaceful manner. Indeed, the written proposal submitted by the Union to Respondent on that date contained the following prefatory sentence: (See Joint Exhibit 17).

> "The UNION proposes three options to the COMPANY for *breaking the impasse*. . . ." (Emphasis added)

Again, on 24 September the Union's message advised callers that Respondent had rejected the Union's proposal "for resolving the impasse."

Hence, the record fully establishes that the parties considered their negotiations deadlocked when the Union rejected the final offer made by Respondent on 5 September. I find no merit in the contention of the Charging Party that the use of the term "impasse" by the union representatives was the result of a layman's understanding and without full knowledge of its legal implications. The bargaining notes and the testimony demonstrates that the representatives for the Union were experienced negotiators who fully comprehended the meaning of this term and its role in collective bargaining. I also reject the argument of the General Counsel that the Union's continued movement toward compromise during the negotiations overrides any characterization it may have made about the status of the negotiations. The record shows that Respondent's merit increase proposal was unacceptable to the Union even though the Union made compromises and alternative proposals during the negotiations.

Nor does the fact that the parties continued negotiating after Respondent's unilateral implementation of its final proposal in any way vitiate the finding of an impasse here. The critical question is whether the negotiations were deadlocked on the date the unilateral implementation occured (23 September), and I find the record amply demonstrates they were indeed deadlocked at that point. Cf. *Financial Inst. Employees of America v. NLRB*, 738 F.2d 1038, 1043 (9th Cir. 1984). Accordingly, I find that the parties had reached a genuine bargaining impasse when the Union rejected Respondent's final offer and, therefore, Respondent was free to implement the terms of its final proposal on the date that it did.

Finally, General Counsel and Charging Party argue that Respondent's implementation of its merit increase program exceeded the terms of the final wage proposal

made to the Union on 5 September. In my judgment, the record also fails to support this contention.

Under the terms of Respondent's final proposal, the amount and frequency of the merit reviews and increases were solely at the discretion of Respondent's division heads and its president. Thus, no limitations were contained in Respondent's wage proposal regarding the number of times an employee could receive a merit review or the percentage of wage increase that could be granted. In addition, Respondent's wage proposal retained the wage progression steps of the current collective-bargaining agreement, thereby enabling some employees to receive a step increase at the same time they received a merit wage increase. The record reflects that the Union's negotiators were informed this could occur. In addition, Respondent's president informed the employees that it was possible they would receive step increases in conjunction with merit increases. I find, therefore, that the record does not establish that Respondent's implementation of the terms of its wage proposal was inconsistent with the terms of the final wage offer made to the Union on 5 September.

C. *The Incidents During the Strike*

There is no significant dispute about the circumstances surrounding the two incidents involving striking employee Koch and supervisors Squires and Rudisailes, respectively. In the Squires' incident, the record discloses that Squires told Koch on 18 September that if the employee returned to work, he would receive double wages and work seven days a week.[28] When Koch stated the Union would fine him more than he would earn if he returned to work, Squires told the employee he could resign from the Union.

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[28] Since Squires could not recall whether he mentioned double wages to Koch, I find Koch's testimony regarding this statement to be a more reliable account of what was said. In all other respects, the testimony of Koch and Squires was in essential agreement.

Regarding the Rudisaile incident, the record discloses that Koch was in his automobile trailing the bus from the Hayden facility in order to determine which employees were working during the strike. Further, that Rudisaile became angry when he observed the bus being followed and confronted Koch at the Holiday Inn. I credit the testimony of Koch, his wife, and Libby and find that during the confrontation Rudisaile told Koch he knew who he was and that he would watch Koch's schedule and get him when [the strike] was over.

While Respondent does not seriously contend that these incidents did not take place, it argues that it is not liable for the conduct of Squires or Rudisailes because all supervisors had been instructed by management not to threaten or make any promises to the striking employees. Respondent further asserts it disavowed the unauthorized conduct of Squires and Rudisaile by convening a meeting of all supervisors, after it learned of the two incidents, and reiterating its pre-strike admonition to them.

I find Respondent's defense here to be without merit. It is more than apparent that Squires' comments to Koch constituted nothing more than a solicitation of the employee to abandon the strike and his support of the Union on the strength of a promise that the employee would receive double his normal wages if he returned to work. It is well settled that such solicitations to striking employees, which encompass promises of benefits, violate the Act. *Pittsburgh and New England Trucking*, 238 NLRB 1706, 1707 (1978); *American Steel Building Co., Inc.*, 208 NLRB 900 (1974). Nor can Respondent avoid responsibility for Squires' unlawful solicitation: even though it was not authorized and was specifically prohibited by Respondent's higher-level management. The supervisors were cloaked with apparent authority to speak on behalf of management and there is nothing in this record which would have indicated to Koch that Squires was acting contrary to management's instructions. Indeed, the fact

that Squires and Koch were personal friends only served to enhance the impression that Squires was speaking on behalf of management. See *Pittsburgh and New England Trucking, supra.*

Similarly, it is equally apparent that Rudisailes threatened to retaliate against Koch for engaging in lawful strike activity at the time of the incident in the parking lot. It is axiomatic that such threats are inherently destructive of the rights guaranteed employees under Section 7 of the Act. That Respondent also specifically prohibited such conduct by its supervisors does not relieve it of the responsibility for Rudisailes' actions any more than it did in the case of the Squires' solicitation.

Finally, the station superintendent's meeting with the supervisors at the Hayden facility, after both incidents became known, also fails to absolve Respondent of the responsibility for the unlawful conduct of Squires and Rudisailes. There is nothing in the record which demonstrates Respondent's purported disavowal of the unlawful actions was ever made known to any of the employees. Therefore, the impact of this unlawful conduct was never dissipated or nullified. I find, therefore, that Respondent violated Section 8(a)(1) of the Act when supervisor Squires unlawfully solicited employee Koch to abandon the strike and return to work. I also find that Respondent committed an additional violation of Section 8(a)(1) when supervisor Rudisailes threatened employee Koch for engaging in lawful strike activity.

Conclusions of Law

1. Respondent Colorado-Ute Electric Association, Inc., is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local No. 111 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not refuse to bargain in good faith with the Union during the wage-reopener negotiations between the parties and, therefore, did not violate Section 8(a)(5) and (1) of the Act.

4. Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing the terms of its wage proposal after the parties bargained in good faith to a valid impasse.

5. Respondent did not engage in direct dealing with employees concerning their wages and, therefore, did not violate Section 8(a)(5) and (1) of the Act.

6. Respondent violated Section 8(a)(1) of the Act by promising an employee increased wages and longer hours of work in order to solicit that employee's abandonment of the strike and his support of the Union.

7. Respondent violated Section 8(a)(1) of the Act by threatening an employee for engaging in lawful strike activity.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER [29]

Respondent, Colorado-Ute Electric Association, Inc., its officers, agents, successors, and assigns shall:

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[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Unlawfully soliciting striking employees in order to induce them to abandon support of the strike and of the Union by promising them increased wages and longer hours of work.

(b) Threatening employees for engaging in lawful strike activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at all of its facilities in Colorado copies of the atached notice marked "A." [30] Copies of said notice on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof and maintained by Respondent for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 27, in writing, within 20 days of the date of this Order what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED, that all other allegations of the consolidated complaint not specifically found to be violations of the Act are hereby dismissed.

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[30] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATE COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated: 30 April 1986

/s/ Gordan J. Myatt
GORDON J. MYATT
Administrative Law Judge

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A HEARING WHEREIN ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, THAT WE COMMITTED CERTAIN UNFAIR LABOR PRACTICES IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, WE HEREBY NOTIFY YOU THAT:

WE WILL NOT solicit striking employees to induce them to abandon their support of the strike and of the Union by promising them increased wages and longer hours of work.

WE WILL NOT threaten employees because they engage in lawful strike activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.
(Employer)

Dated By .
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Region 27, U.S. Custom House, Room 260, 721 - 19th Street, Denver, Colorado 80202; telephone (303) 844-3551.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9545

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 111,
Intervenor,

NATIONAL ASSOCIATION OF MANUFACTURERS,
Amicus Curiae.

ORDER

Filed September 24, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of intervenor's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ PATRICK FISHER
Chief Deputy Clerk

Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1284

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111

Petitioner,

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

RESPONDENT COLORADO-UTE ELECTRIC ASSOCIATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly held that when the National Labor Relations Board finds a collective bargaining impasse over the terms and conditions of an employer's merit pay proposal has occurred, an employer does not commit an unfair labor practice when it subsequently implements that merit pay proposal.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

COUNTERSTATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

I. THE DECISION BELOW RAISES NO ISSUES WORTHY OF REVIEW 7

II. IT IS NOT A PER SE VIOLATION OF THE NLRA FOR MANAGEMENT TO BARGAIN AND IMPLEMENT AT IMPASSE THE MANDATORY SUBJECT OF MERIT RAISES EVEN IF CONSIDERED A WAIVER OF THE UNION'S REPRESENTATIONAL DUTIES 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page

Chevron Chemical Co.,
261 N.L.R.B. 44, 110 L.R.R.M. 1005 (1982) 12

Atlantic Research Corp.,
144 N.L.R.B. No. 39, 54 L.R.R.M. 1049 (1963) 15

In re Colorado-Ute Electric Assn.,
120 Bankr. 164 (Bankr. D. CO. 1990) 3

H.K. Porter Co. v. NLRB,
397 U.S. 99 (1970) 8, 9

Koenig Ironworks,
276 N.L.R.B. 811 (1985) 14, 15

Local Union No. 47, IBEW v. NLRB,
927 F.2d 635 (D.C. Cir. 1991) 12

Machinists v. Wisconsin Employment Relations Comm.,
427 U.S. 132 (1972) 17

McClatchey Newspapers, Inc. v. NLRB,
299 N.L.R.B. No. 156 (1990) 13

NLRB v. American Natl Ins. Co.,
343 U.S. 395 (1952) 7, 8, 9, 10

NLRB v. Blevins Popcorn Co.,
659 F.2d 1173 (D.C. Cir. 1981) 11, 12, 14

NLRB v. J.H. Allison & Co.,
165 F.2d 766 (6th Cir. 1948) 11, 12

NLRB v. Katz,
369 U.S. 736 (1962) 8, 9

NLRB v. Sands Mfg. Co.,
306 U.S. 332 (1939) 13

NLRB v. Tomco Comm., Inc.,
567 F.2d 871 (9th Cir. 1978) 11

NLRB v. Wooster Div. of Borg-Warner Corp.,
356 U.S. 342 (1958) 8

Newspaper Printing Corp. v. NLRB.,
625 F.2d 956 (10th Cir. 1980) 9

Oneita Knitting Mills,
205 N.L.R.B. 500 (1973) 14

Reichold Chemicals, Inc.,
277 N.L.R.B. 639 (1985) 14

Shell Oil Co.,
77 N.L.R.B. 1306 (1948) 14

Southern Wipers, Inc.,
192 N.L.R.B. 816 (1971) 12, 15

State Bank of India,
273 N.L.R.B. 267 (1984) 14

Struther Wells Corp. v. NLRB,
721 F.2d 465 (3d Cir. 1983) 10, 11

Toledo Typographical Union No. 63 v. NLRB,
907 F.2d 1220 (D.C. Cir. 1990) 12

STATUTES

Labor Management Relations Act,
§ 8(d), 29 U.S.C. § 158(d) 7, 8

No. 91-1284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF, ELECTRICAL WORKERS, LOCAL NO. 111,

Petitioner,

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT COLORADO-UTE ELECTRIC ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent, Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The facts here are essentially uncontested.[1] The Appellate Court's recitation is correct.

However, there exist two significant discrepancies in the Petitioner's presentation that requires clarification. The first involves the extent of bargaining for the employer's merit pay proposal. The second, involves whether Respondent engaged in any direct dealing with employees, a question found in the negative by the Board.

1. The collective-bargaining agreement relative to this proceeding was effective from September 11, 1983 to September 13, 1986. Vol. II, Jt. Ex. 1. Article 32 of the agreement provided a wage reopener clause allowing either party to "elect to negotiate wages" during the contract's term. That agreement also provided wage scale increases based upon tenure alone rather than performance. On June 8, 1984, the union gave Colorado-Ute notice that it wished to renegotiate wages.

Beginning on July 31, 1984, the parties embarked on a total of twenty-three (23) bargaining sessions. Eight sessions involved a federal mediator. Beginning with the very first session, Colorado-Ute announced that it "was under pressure from other businesses in the community because Respondent's wage rates were higher than the rates which prevailed in the area." Pet. 52a Colorado-Ute also explained to the union that across the board increases did not reward those employees at the top of the wage scales and actually provided them with smaller increases. Pet. 53a n.7. Colorado-Ute also wanted to reward superior employee performance, which the wage scales did not provide. Pet. 81a. The union proposed a nine (9) percent across the board increase.

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[1]Respondent Colorado-Ute Electric Association, Inc. is presently a debtor in bankruptcy. *See In re Colorado-Ute Electric Assn.*, 120 Bankr. 164 (Bankr. D. CO. 1990). Liquidation of the bankrupt estate has yet to occur.

In response to concerns expressed by the union, Colorado-Ute agreed to retain the progression steps over concern by the union that there would be no other wage guarantees, Vol. I at 228, ll. 20-25. Thereafter, merit raises proposed by Colorado-Ute were to be made within the limited range of seven progression steps that Colorado-Ute proposed to retain. 52a; Vol II, Jt. Ex. 11. The first tier of the two tier wage structure Colorado-Ute proposed included "step increases" for each job classification with the first rate increase after six months, advancing early to the seventh rate step in the "6th year," and continued advancement through the steps based on time in grade. Jt. Ex. 11. There is no dispute that the minimum wage steps in the contract were subject to the grievance and arbitration procedures. Pet. 24a; Vol I. at 75, ll.5-20.

The second-tier of the wage proposal was the merit increase program. Here "individual performance and contribution on the job" were the applicable criteria. The amount and timing of merit pay to be determined by the division head and the president. Jt. Ex. 11. Colorado-Ute also reacted to concerns about favoritism and proposed that the company president decide merit increases, Vol. I at 229, ll. 10-25. Colorado-Ute included standards for merit increases: "individual performance and contribution on the job." Jt. Ex. 11.

Through the next nine bargaining sessions, Colorado-Ute modified its initial merit wage proposal and adopted some modifications recommended by the union.[2] At the tenth bargain-

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[2]For example, Colorado-Ute initially proposed that its merit increases come from the recommendations of supervisors. At the fourth bargaining session, the union noted that employees would be wary of filing grievances if they thought it would jeopardize their merit increases. Pet. 55a. In that session, Colorado-Ute "abandoned its stand on the elimination of the progression steps and incorporated them in toto as the bottom tier for each successive wage proposal submitted to the union during the negotiations." Pet. 81a. At the sixth session, Colorado-Ute revised its original merit raise plan and proposed to have merit reviews determined by department heads with an appeal to the company president. Pet. 66a-57a.

ing session on September 5, 1984, Colorado-Ute submitted its "Final Company Offer" which maintained the current progression steps for each job classification and set forth a merit increase program with the amount and frequency to be determined by the appropriate department head considering an employee's performance. Colorado-Ute also informed the union that it "reserve[d] the right to 'impasse' its proposal." Pet. 60a. The union counter-offered with a four percent across the board increase.[3]

On September 12, 1984, Colorado-Ute notified the union that it considered the parties to be at impasse regarding the wage negotiations and that on September 23 it would implement its final wage proposal. Pet. 61a. On September 18, the union began picketing petitioner's facilities. The strike ended on October 8, 1984. Vol I at 79, ll 1-2.

At the bargaining session of October 3, 1984, Colorado-Ute provided the union the results of its first merit wage review. 63a n.11.[4] The union never requested to bargain over the individual merit increases and, in fact, declined some offers to participate. In Joint Exhibit 50, the union's negotiating notes on October 3, 1984, show Colorado-Ute offered to discuss merit increases at labor-management meetings. On November 6, Respondent suggested that the business agent attend meetings with the President and Division Heads of Colorado-Ute which determined the merit increases. Vol. I at 329, ll. 1-8, but the union declined. Vol. I at 329, ll. 9-11.

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[3]At the twenty-third (23) session, Colorado-Ute agreed to permit employee appeals of their merit award to the company president to be presented with a union representative present. Pet. 24a; 71a.

[4]Contrary to the statement made by Petitioner at p.4, Colorado-Ute did not "grant" merit increases on September 23, 1984, but began the pay period for merit wages. Pet. 63a. Monetary payments did not reach unit employees until payday October 5, 1984.

2. The second error in the Petition is the impression that the employer "met personally with employees, without the union, to discuss dissatisfaction with merit increases." Pet. at 5. This is incorrect. The union's own steward invited Respondent's president to speak to unit employees. That steward, Joan Hiss, requested management to outline how the merit pay plan would work. 71a. Subsequently, Joan Hiss expressed dissatisfaction with her own merit pay raise. She presented her objection to Respondent's president who told Hiss to await her next step increase. 72a. The Board found that Colorado-Ute did not attempt to bargain individually in these circumstances and that the union's steward's "complaint regarding her wage increase as an employee cannot be divorced from her representative status as the union steward. Thus, Hiss the union steward was in fact representing Hiss the employee." Pet. 84a.

3. Under these circumstances, the ALJ concluded that Colorado-Ute had not engaged in bad-faith or surface bargaining. He found that the Colorado-Ute had bargained hard for the two-tier wage structure, a "legitimately held position during the wage-reopener negotiations." Pet. 80a. Moreover, the ALJ found that incorporation of the bottom tier of guaranteed rate increases of 3.5% into the wage proposal, also reflected good faith. Pet. 80a.

Finding a "genuine impasse," Pet. 85a, the ALJ held that Colorado-Ute was "free to unilaterally implement changes in employment terms and conditions; provided those changes are reasonably consistent with the terms last offered to the Union during negotiations." Pet. 85a. He also ruled "the amount and frequency" as well as "the number of times" Colorado-Ute could give merit reviews to the employees were within its discretion: "Thus, no limitations were contained in Respondent's wage proposal regarding the number of times an employee could receive a merit review or the percentage of wage increase that could be granted." Pet. 89a.

The Board agreed with the ALJ's determinations that the parties had reached impasse on September 12, 1984, that Colorado-Ute had not engaged in bad faith or surface bargaining, and

even that Colorado-Ute "was free to consider employees for merit increases and to base its consideration on the criteria mentioned above, for neither of these aspects of its proposal involved the waiver of a statutory right." Pet. 37a-38a. The Board agreed that merit increases were a mandatory subject of bargaining and "if the parties reach good-faith impasse in negotiations, the employer generally does not violate Section 8(a)(5) by thereafter implementing changes consistent with those proposed to the union." Pet. 36a. "The employer's duty to bargain does not give the union the right to veto the proposed changes by withholding consent." Pet. 36a-37a.

However, the Board decided that the increases themselves, apart from the program, were tantamount to "wages" under section 8(d) of the Act and therefore the actual granting of merit increases under the program may involve substantial discretion...the bargaining agent is entitled to be consulted." Pet. 34a. The Tenth Circuit denied the Board's request to enforce that ruling. It held the Board was wrongfully attempting to protect the union's right to bargain by regulating substantive contract terms at the expense of the employer. Pet. 28a.

SUMMARY OF ARGUMENT

The court below reaffirmed the line demarcating federal interference with the collective bargaining process set by this Court in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). There, this Court reaffirmed that mandatory subjects of bargaining and terms within collective bargaining agreements are matters outside the Board's supervisory jurisdiction.

The Tenth Circuit ruled that upon a good faith impasse over a mandatory issue of collective bargaining, an employer is free to attempt to impose its last offer. The Petitioner's attempt to show that an employer's implementation of merit pay at impasse "waives" an inchoate union right to bargain rather than a union obligation to statutorily "meet and confer" with the employer on

mandatory subjects, is novel.[5] Furthermore, this argument fails to comport with unanimous legal precedent in the circuits and is actually an attempt to obtain under auspices of the Act contract benefits Petitioner could not win for itself at the bargaining table. For these reasons, no substantive rule of law is presented warranting review at this time.

THE WRIT SHOULD BE DENIED

I. The Decision Below Raises No Issues Worthy of Review

The Petitioner alleges that the decision below conflicts with decisions of this Court. Although the matter represents an important issue in the law, the decision of the Tenth Circuit plainly considered and relied upon this Court's decisions in *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Careful review of the appellate court's decision creates or sustains no conflict in the circuits or in any other federal court.

As the Tenth Circuit recognized, the Board's position in this case was one of first impression and was made without reliance upon any legal authority. It was Congress' purpose in requiring collective bargaining not to authorize the Board to implement or remake any contract provision of either party not won at the bargaining table, but to provide a forum where disagreements could be peacefully settled, and if not, to permit either party to resort to economic weapons at its disposal to achieve its objectives. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402-04 (1952).

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[5]Section 8(d), 29 U.S.C. § 158(d), establishes that the statutory representative has only a *duty* to meet and confer with the employer to reach an agreement. It provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Furthermore, Congress required bargaining only over wages or terms and conditions of employment. 29 U.S.C. § 8(d). Subjects covering these areas are mandatory subjects of bargaining that may be insisted upon to impasse. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). If agreement between labor and management cannot be reached on particular mandatory subjects of bargaining, then an employer has always been free to implement its last offer in order to carry on its business. *See NLRB v. Katz*, 369 U.S. 736, 745 (1962)[6]; *Newspaper Printing Corp. v. NLRB.*, 625 F.2d 956. 966 (10th Cir. 1980).

However, the Board found that because "the actual granting of merit increases under the program may involve substantial discretion," the union must be consulted in "determining the amounts and timing of the increases." Pet. 34a. This conclusion can only be true where the employer agreed to give the union that right in its proposal. When the union makes no proposal to limit the employer's discretion over timing and amounts, how can it be said that the employer either failed or refused to bargain over them? "Certainly, the Board lacks the power to compel concessions as to the substantive terms of a labor agreement." *American Nat'l Ins. Co.*, 343 U.S. at 833. Neither can the Board through its remedial power seek to set aside employment terms:

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based-private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

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[6]In *Katz*, the Court distinguished the situation where the employer implemented a different economic package at impasse: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." *Katz*, 369 U.S. at 745 n. 12.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970).

The Court in *H.K. Porter*, clearly demonstrated that the Congress believed that the balance of economic harm provided for in the Act would encourage mutual bargaining. If the elements of an employer's final offer and economic devices can be upset by the Board, Congress' carefully constructed policy would be destabilized because workers always retain the economic means to apply pressure through the right to strike over any disagreement with management's proposed terms, as it did here. The Board cannot interfere in this process by either taking statutory embedded employee rights away or repositioning the fulcrum to the detriment of employers.

The circuit courts are not in disagreement on this issue. In *Struther Wells Corp. v. NLRB*, 721 F.2d 465 (3d Cir. 1983), *enf. denied*, 262 N.L.R.B. 1080 (1982), the Third Circuit denied enforcement of a Board decision that the company could not insist on merit pay in management's "sole discretion." As in the case at bar, the Board had held that for the union to agree to the merit wage provision would cause a waiver of its right of representation that the employer could not insist to impasse upon. Therefore, the employer's alleged bad-faith attempt to negotiate that merit pay prevented a valid impasse. The Third Circuit disagreed:

> In *American Nat'l*, the Supreme Court held that an employer does not commit a per se unfair labor practice by bargaining for a management functions clause that gives management exclusive control over matters that otherwise would be subject to the duty to bargain. 343 U.S. at 409, 72 S.Ct. at 832. Similarly, the company here did not violate the Act by insisting on a clause by which it would maintain exclusive control over merit increases....
>
> It appears that the Board, by finding bad faith in these proposals, is doing exactly what it may

> not do. The Supreme Court has stated that "the Board may not, either *directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreement." *American Nat'l*, 343 U.S. at 404, 72 S.Ct. at 829. The Court has further stated that § 8(d) was meant to prevent the Board from controlling the settling of the terms of collective bargaining agreements.

721 F.2d at 470 (emphasis added).

Similarly, in *NLRB v. Tomco Comm.*, Inc., 567 F.2d 871, 883 (9th Cir. 1978), the Ninth Circuit rejected the Board's theory that a management rights clause granting management exclusive authority over such terms of employment as wage rates, incentives and bonus compensation were 'proposals clearly designed to force the Union into abandoning its *statutory rights and duties*.'" 567 F.2d at 878 (emphasis in original).

> If the point is that the Union has a *duty* of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these prerogatives, we find the doctrine novel. The Board cites no statutory or case law in its support.

Id. at 878-79.

The Tenth Circuit followed the decisions of its sister Circuits construing *American Nat'l Ins.*, that "similarly rejects the Board's position that instituting discretionary wage terms necessarily abrogates, or even diminishes, a union's right to bargain. To the contrary, by vigorously bargaining over how a discretionary wage clause would be implemented, an employer *vindicates* the union's right to bargain." Pet. 23a. The Board's attempt to "indirectly" control the employer's right to preserve its economic position at

impasse eviscerates the employer's bargaining rights. Pet. 26a.[7] In all respects, the Petitioner's argument conflicts with this Court's intent and must be rejected.

The fact that implementation of a merit pay proposal does not constitute a waiver of union rights was previously the Board's long-standing position. *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971). There, the reservation by management of merit increases was also argued to be a waiver of the union's right to bargain and upon impasse, that merit raises could not be granted. The Board held this argument was unpersuasive not because the employer was refusing to bargain over wages, but because the employer was refusing to give in to the union's position and it was not required to. Moreover, as here, the employer "provided the Union with advanced notice of its intent to grant merit increases before it did so." 192 N.L.R.B. at 822. *Also Chevron Chemical Co.*, 261 N.L.R.B. 44, 110 L.R.R.M. 1005 (1982) (finding no violation when employer implemented merit wage increases).[8]

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[7]The Petitioner's suggestion that *NLRB v. J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948) and *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), conflict with the Tenth Circuit's ruling is out of context and incorrect. *J.H. Allison* was a case where the employer completely refused to bargain over the subject of merit raises and refused to provide the union with information concerning individual raises to unit employees in the mistaken belief that "merit raises are not proper subject matter for collective bargaining." 165 F.2d at 767. In *Blevins*, a contempt case, the D.C. Circuit explained that the employer's merit pay proposal was in fact executable "so long as it is willing to confer with the union if the wages are questioned. In other words, it need not bargain *before* it grants the raise." 659 F.2d at 1189 n.98 (emphasis in original). Clearly, both cases are distinguishable from the instant case, for Colorado-Ute bargained to impasse on merit pay and the record demonstrates the union never sought to question the raises actually granted to the bargaining unit.

[8]Petitioner suggests that *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991), cited at pp. 8-9 is indistinguishable to its favor. There, the employer also imposed its wage scale after impasse during contract reopener negotiations. The Board and the circuit court found a valid impasse had been reached and that the employer's action implementing across-the-board raises was proper economic leverage under the extant union contract. *Id.* at 644. Similarly,

Having deviated from its long-standing interpretation of the Act, the burden was on the Board and Petitioner to explain why the creation of a new union right is a feasible interpretation of the Act when other courts have not accepted any such extreme limitation on management's right to continue its business at impasse. *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 343 (1939). Colorado-Ute never requested that the union waive its statutory right to bargain over wages. In fact, Colorado-Ute was bargaining with the union only over wages at the time; the single item covered by the reopener clause. Colorado-Ute bargained vigorously over the wage proposal and did not seek the right to bargain individually with employees. The union, as vigorously, refused to consider Colorado-Ute's plan.

Although the Petition incorrectly identifies a circuit conflict as necessitating review, it is clear that the Board's decision affects all employers nationwide and has ignited a troublesome issue central to the administration of the Act. Because the Board is continuing to interpret the Act in spite of the Tenth Circuit's adverse ruling, *see McClatchey Newspapers, Inc. v. NLRB*, 299 N.L.R.B. No. 156 (1990), pet. docketed 90-1602 (Argued Feb. 3, 1992), the Court may properly grant certiorari to affirm.

II. IT IS NOT A PER SE VIOLATION OF THE NLRA FOR MANAGEMENT TO BARGAIN AND IMPLEMENT AT IMPASSE THE MANDATORY SUBJECT OF MERIT RAISES EVEN IF CONSIDERED A WAIVER OF THE UNION'S REPRESENTATIONAL DUTIES.

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the D.C. Circuit in *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), found an employer's negotiation to impasse on a clause allowing direct dealing with employees on retirement issues inappropriate. Thus, if *Toledo Blade* had merely bargained to impose retirement packages "unilaterally, they would not entail its negotiating with its employees. In contrast, the clause at issue here contemplates direct negotiation between employer and employee...to the exclusion of the Union, in negotiating the terms and conditions of retirement." *Id.* at 1223-24. That power distinguishes this case, for Respondent never sought to obtain it from the union.

The Tenth Circuit properly rejected the Board's refusal to allow Colorado-Ute to implement its merit raise proposal, as "fundamentally at odds" with the law of impasse. Pet. 26a. The Petitioner's attempt to compare the implementation stage as akin to an employer imposing a no-strike clause on a union at impasse is entirely different, Pet. 37a, since the right to strike is an explicit statutory right and one the Congress refused to make conditional by any other labor law principle:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163.

But, the employees' right to strike set out in the union's analogy, is also not specifically within the confines of the bargaining duty of an employer and union in section 8(d) as a wage or term of employment. It may, however, be exchanged as the quid pro quo of a grievance-arbitration clause. *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). Its *sui generis* suggestion that a unique "right' to approve every aspect of an employer's imposed wage scale exists is also a novel interpretation of the Act.

The Petitioner cites four cases to support its proposition: *Koenig Ironworks*, 276 N.L.R.B. 811, 814 (1985); *State Bank of India*, 273 N.L.R.B. 267 n.5 (1984), *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981); and *Oneita Knitting Mills*, 205 N.L.R.B. 500 n. 1 (1973). However, the only case the Board cited for its waiver proposition is *Oneita Knitting Mills*, 205 N.L.R.B. 500 n. 1 (1973). That case is much different from the one at bar, for there, the company awarded merit raises under a prior merit pay policy one month after the union was certified. The merit raises not having been subject to negotiation under §

8(d), became section 8(a)(1) and 8(a)(5) activity; for the employer unilaterally changed the negotiating environment.[9]

All these cases are very much different from the impasse situation reached by Colorado-Ute and the union that attempts to reverse unsuccessful negotiations concluded between the parties and a 180 degree turnaround from *Southern Wipers, Inc.*, 192 N.L.R.B. 816 (1971), where the Board permitted merit raises when no evidence of bad faith bargaining existed. *See also Atlantic Research Corp.*, 144 N.L.R.B. No. 39, 54 L.R.R.M. 1049 (1963) (no ULP where the employer "offered to discuss in advance with the union any contemplated increase and to furnish it with necessary information prior to implementation.").

Even after conveying the merit raise results to the union before their payment, the union insists that Colorado-Ute had "to

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[9]The other cited cases are inapposite. In *Koenig Iron Works*, the Board held that an employer's unilateral grant of wage increases in accord with past practice and in accordance with a prior contract had been abrogated by the Board's certification of a new bargaining representative, and was therefore unlawful. The Board did, however, suggest that the employer and union "did not reach an impasse in negotiations...that would justify the Respondent's unilateral wage increases...." 276 N.L.R.B. at 811. It also noted that the employer implemented the wage increases without speaking to the union. In the case at bar, the union possessed the merit pay list for three bargaining sessions prior to Respondent's payment of the merit increases, e.g., September 27, October 3, and October 4, 1984.

In *State Bank of India*, the union was certified on 23 February 1983, and on 28 April 1983, the employer granted a unilateral wage increase that it alleged had been promised previously to the workers. Because the wage increases were paid without notice or bargaining with the union, the Board determined a violation of § 8(a)(5) was at hand. This situation is again, quite unlike the 23 bargaining sessions Colorado-Ute and the Union had.

Furthermore, in *Blevins*, a complicated decision where the employer correctly delayed its discretionary merit increases until completing bargaining with the union, the Board believed the employer should have paid the amounts during bargaining, contrary to *Katz*. In the case at bar, because impasse was reached between the parties, *Blevins* is distinguishable and Colorado-Ute was empowered to implement its merit wage plan.

negotiate [again] over the increases" and whether a dissatisfied employee could approach the employer. The latter result the union finally achieved through bargaining with Colorado-Ute. Pet. 71a. This is simply a way of demonstrating that the union either obtained the concession through its successful application of economic power, *viz.*, the strike or the power of persuasion. The union's request to the Board to be empowered to question an individual's specific merit raise proves the matter was a bargainable issue and not some statutory union right that the union could not "offer" to trade away.

In *American Nat'l Ins. Co.*, the Board had held that the employer's insistence on a strong management rights clause was not only evidence of bad faith bargaining, but was by itself a violation of the Act. In rejecting the Board's holding, this Court reasoned that, "[i]f the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith...." *Id.* at 407. The Petitioner's argument harks back to this position rejected by the Court, that an employer might bargain for discretion to impasse, but not the logical consequence "whether the employer may implement that discretion once an impasse is reached." Pet. at 14. In language clearly dispositive of this issue, the Court states:

> Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case.

Id. at 409.

In short, it is well settled that an employer may bargain to impasse on mandatory subjects of bargaining. It is equally well settled that the proper standard by which an employer is to be judged, is the good faith standard embodied in section 8(d) of the Act, which the Board has in fact ruled occurred between Colorado-Ute and the union. The union met and conferred with Respondent on wages, but was unable to achieve its bargaining objective to embed "fixed standards," *American Nat'l Ins.* at 408, by economic means and persuasion. Having failed at the contract table, the union improperly attempts to force a different bargain from Respondent that Respondent never offered to it.

Under well-established rules of collective bargaining, a union need not accede to a management proposal and may always engage in adverse economic activities to attempt to persuade management otherwise. *See Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1972) (neither the union or the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful."). However, that ability to persuade the employer by strikes and other means does not equate with a right to prohibit management from implementing proposed contract terms upon a well founded impasse in collective bargaining. Neither does the Petitioner explain what overriding interest of collective bargaining will be vindicated by resolution in its favor or where the Board's jurisdiction to interfere in the process, if allowed, will end. Since none of these considerations are present, important labor law interests will remain unaffected by granting the writ.

CONCLUSION

For the reasons set out above, the Court should deny Petitioner's request for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: April 8, 1992

(3)

No. 91-1284

FILED
MAY 8 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111, PETITIONER

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC. AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an employer violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing upon impasse a merit pay proposal that granted it complete discretion over the timing and amount of individual wage increases.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Ford Motor Co. v. *NLRB*, 441 U.S. 488 (1979)	7
Litton Fin. Printing Div. v. *NLRB*, 111 S. Ct. 2215 (1991)	7, 8
Local Union No. 47, IBEW v. *NLRB*, 927 F.2d 635 (D.C. Cir. 1991)	9
McClatchy Newspapers, Inc., Publisher of the Sacramento Bee, 229 N.L.R.B. No. 156 (Sept. 27, 1990), petitions for enforcement and review pending, Nos. 90-1517 & 90-1602 (D.C. Cir. argued Feb. 3, 1992)	7, 8
NLRB v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952)	5, 7
NLRB v. *Blevins Popcorn Co.*, 659 F.2d 1173 (D.C. Cir. 1981)	8
NLRB v. *J.H. Allison & Co.*, 165 F.2d 766 (6th Cir. 1948)	8
NLRB v. *Katz*, 369 U.S. 736 (1962)	4, 6, 7
Oneita Knitting Mills, Inc., 205 N.L.R.B. 500 (1973)	4
Tocco Division of Park-Ohio Industries, 257 N.L.R.B. 413 (1981), enforced, 702 F.2d 624 (6th Cir. 1983)	4
Toledo Typographical Union No. 63 v. *NLRB*, 907 F.2d 1220 (D.C. Cir. 1990)	8, 9

Statutes:

National Labor Relations Act 29 U.S.C. 151 *et seq.*	3
§ 7, 29 U.S.C. 157	3-4
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3
§ 8(a)(5), 29 U.S.C. 158(a)(5)	3, 4, 5
§ 8(d), 29 U.S.C. 158(d)	3, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 939 F.2d 1392. The decision and order of the National Labor Relations Board (Board) (Pet. App. 29a-43a) and the recommended decision of the administrative law judge (ALJ) (Pet. App. 46a-94a) are reported at 295 N.L.R.B. 607.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1991. A petition for rehearing was denied on

September 24, 1991. Pet. App. 96a-97a. On December 16, 1991, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 22, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, International Brotherhood of Electrical Workers, Local No. 111 (Union) and respondent Colorado-Ute Electric Association (Company) were parties to a collective bargaining agreement covering office and clerical employees. Under the agreement, wage rates for each job classification were determined by seven progression steps. Employees advanced from step to step at established intervals. In late July 1984, the Company and the Union began midterm wage negotiations under the collective bargaining agreement's wage reopener provision. The parties held nine bargaining sessions during July and August. During those sessions, the Union insisted on an across-the-board wage increase for unit employees. The Company insisted that any wage increase be instituted under a merit program. Pet. App. 30a-31a, 53a-60a.

At the parties' tenth bargaining session on September 5, 1984, the Company presented the Union with a written proposal that it described as its "final offer." The proposal retained the existing collective bargaining agreement's progression steps and wage rates, but added a merit pay system to those rates. The proposal stated that employees would receive additional merit increases "based on their individual performance and contribution on their job" and that "[t]he amount and frequency of such merit increase will be determined by the Division Head and

President and will not be subject to the grievance procedure." Pet. App. 31a.

Following the Union's rejection of the Company's offer, the Company notified the Union that it considered the parties to be at impasse and that it would implement its final offer in two weeks. At the parties' bargaining session on September 27, 1984, the Company gave the Union a handout detailing the results of the first set of merit increases. The next day, the Company provided the Union with a written summary of the implementation of the merit system; of the 73 employees, 47 had been reviewed and 44 received increases. On October 30, the Company notified the Union of its review of the remaining employees and listed the merit increases given. Thereafter, the Company sent the Union periodic listings of merit increases that had taken effect the previous month. Pet. App. 31a-32a. In subsequent bargaining sessions, the parties were unable to reach agreement and negotiations ceased after a final meeting on March 27, 1985. *Id.* at 33a.

2. The Board concluded that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (the Act), by unilaterally granting merit wage increases to its employees without consulting with the Union over their timing and amount.[1] Pet. App. 38a. It ordered the Company,

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[1] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d), 29 U.S.C. 158(d), defines the obligation to bargain as a requirement "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157." Section 7,

inter alia, to bargain on request with the Union over the timing and amount of employee merit wage increases. *Id.* at 40a.

The Board stated that merit wages are a mandatory subject of bargaining, and that the bargaining obligation encompasses a duty to negotiate over the procedures and criteria for granting merit increases to employees. Moreover, "[t]he implementation of a merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted." Pet. App. 34a, citing *NLRB* v. *Katz*, 369 U.S. 736, 745-747 (1962); *Oneita Knitting Mills, Inc.*, 205 N.L.R.B. 500, 500 n.1 (1973). The Board noted that the Company's September 5 merit pay proposal provided "no role for the Union in the initial determination of the increases' timing and amounts" and "also exempted management's decision on these matters from union or employee challenge through the contractual grievance procedure." *Ibid.* The Board concluded that, in proposing "to exclude the Union from this exercise of discretion over employees[']] wages," the Company "was seeking the Union's waiver of its statutory rights under Section 8(a)(5) of the Act." *Ibid.* Such a waiver of bargaining rights under Section 8(a)(5) will "not be lightly inferred but must be clear and unmistakable." Pet. App. 35a, citing *Tocco Division of Park-Ohio Industries*, 257 N.L.R.B. 413, 414 (1981), enforced, 702 F.2d 624 (6th Cir. 1983). "Here, despite earnest effort, the [Company] was unable to secure the Union's waiver of its right to bargain over the merit increases' timing and amounts." Pet. App. 35a.

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29 U.S.C. 157, guarantees employees "the right * * * to bargain collectively through representatives of their own choosing."

The Board held that the Company could not unilaterally implement its merit pay proposal simply because the parties had bargained to impasse over it. Pet. App. 35a-38a. The Board explained that, although the employer may generally implement changes consistent with its proposals after the parties have reached a good-faith impasse in negotiations, *id.* at 36a, it could not engage in unilateral action that "involved the waiver of [the employees'] statutory right." *Id.* at 38a. The Board concluded that, while "[h]aving reached impasse, the [Company] was free to consider employees for merit increases" on the basis of "individual performance" and "contribution on the job," it was not free, "[h]aving failed to secure a waiver of the Union's statutory right to bargain over the merit increases' timing and amounts, * * * to grant increases without consulting with the Union about these matters." *Id.* at 37a-38a.

3. The court of appeals denied enforcement of the Board's order. The court concluded that the Company was entitled to implement its merit pay proposal after having bargained to impasse with the Union concerning it. Pet. App. 27a-28a. In so holding, the court rejected the Board's view that "an explicit waiver by the Union of its right to bargain [over the frequency and amounts of merit increases] is * * * required," and it concluded "that, given the bargaining history in this case, the Union's statutory right to bargain was vindicated by hard bargaining over merit wage proposals." *Id.* at 18a-19a.

The court relied on *NLRB* v. *American National Ins. Co.*, 343 U.S. 395 (1952), in which this Court held that it does not violate Section 8(a)(5) for an employer to insist in negotiations on a management-rights clause that reserves to the employer the power to act unilaterally with respect to rates of pay, wages, and

hours of employment. The court of appeals deemed that holding to call into question the Board's position that particular merit pay determinations "must be presented to the Union prior to implementation upon impasse." Pet. App. 22a. The court also concluded that the Board's decision improperly limited the Company's use of economic weapons by precluding the Company from implementing its wage proposal at impasse. *Id.* at 25a, citing *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962).

ARGUMENT

1. The issue in this case is one of first impression, and, in our view, the Tenth Circuit erred. The court of appeals held that the statutory right to bargain over the procedures and criteria for granting merit increases does not include the right of the union to participate in determining particular merit increases; rather it encompasses only the right to bargain over whether the union will participate in the process of determining merit increases, and, if so, in what fashion. The court therefore concluded that, once the parties have bargained to impasse over those general issues, the employer is free to implement its proposal by unilaterally granting particular merit increases without consulting the union at all about those actions.

The Board's position is that such unilateral action violates the employer's duty to bargain. Section 8(d) of the Act "encompasses a duty to bargain over the procedures and criteria for granting merit increases" which can be vindicated either by establishing through bargaining the standards for the amounts and timing of such increases, or by providing "for union participation either in the initial determination of merit increases granted to particular employees or

afterwards through the contractual grievance procedure." *McClatchy Newspapers, Inc., Publisher of the Sacramento Bee*, 299 N.L.R.B. No. 156 (Sept. 27, 1990), slip op. 5-6 petitions for enforcement and review pending, Nos. 90-1507 & 90-1602 (D.C. Cir. argued Feb. 3, 1992). Accordingly, while the employer can insist to impasse on a proposal that would vest it with total discretion with respect to merit pay, the employer may not, at impasse, implement such a proposal by unilaterally determining the timing or amount of particular merit increases.

The Board's position is a reasonable interpretation of the Act and is entitled to judicial deference. See, *e.g.*, *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2222 (1991); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496-497 (1979). The court of appeals' substitution of its own view of industrial policy for that of the Board constitutes error.

Contrary to the suggestion of the court of appeals, the Board's position does not conflict with this Court's decision in *NLRB* v. *American National Ins. Co.*, *supra*. There, the Court decided only that it was not *per se* unlawful for an employer to insist, as a condition of reaching agreement during negotiations, on a management-rights clause giving the employer the right to act unilaterally with respect to certain terms and conditions of employment. 343 U.S. at 409. The Court was not presented with, and did not address, the disputed issue here: whether an employer may implement a management rights proposal, upon impasse, when the union has refused to agree to unilateral employer determination of the terms of employment at issue.[2]

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[2] Nor is the issue in this case governed by *NLRB* v. *Katz*, *supra*. In that case, the Court held that an employer "commits

2. Although the court of appeals' decision is incorrect, this Court's review of the issue would be premature. This is the first judicial decision to consider the Board's position concerning an employer's post-impasse unilateral implementation of a proposed discretionary merit increase system. Moreover, the identical issue is now before the D.C. Circuit in *McClatchy Newspapers, Inc.* v. *NLRB*, *supra*.

The cases cited by petitioner (Pet. 8-9) do not establish a conflict in the circuits on this issue. In *NLRB* v. *J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948), the court, upholding the Board's decision, rejected the employer's contention that it never had to bargain about individual merit increases because such raises were a management prerogative. In *NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), the court agreed with the Board that the employer was not privileged to withhold, during negotiations, a preexisting discretionary wage increase without consulting the union. Neither case involved the issue here: whether the employer satisfies its statutory obligation to bargain over individual merit increases by insisting to impasse on a proposal to make those determinations unilaterally. *Toledo Typographical Union No. 63* v. *NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), like *American National Insurance*, involved the issue of whether the employer could insist to impasse in negotiations on a proposal that eliminates the union's role in defining a condition of employment; the

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an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing*, 111 S. Ct. at 2221. The Court had no occasion to consider the distinct question of whether it is permissible for an employer to implement, after impasse, particular unilateral changes under management rights clauses, as the employer did in this case.

court noted that "[w]hether the Employer could thereafter implement the proposal without the Union's consent is not at issue in this case." *Id.* at 1223. Finally, in *Local Union No. 47, IBEW* v. *NLRB*, 927 F.2d 635 (D.C. Cir. 1991), while the court upheld the Board's position that an employer could implement at impasse its final offer made after wage reopener negotiations, it expressly noted that the "flat wage increases" involved there were not "analogous to the merit-pay consultation right at issue in *Colorado-Ute*." *Id.* at 644-645.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

☆ U.S. GOVERNMENT PRINTING OFFICE 1992–312-324/45426

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

No. 91-1284

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 111

Petitioner,

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
and NATIONAL LABOR RELATIONS BOARD

Respondents.

SUPPLEMENT IN THE NATURE OF REPLY OF RESPONDENT COLORADO-UTE TO OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Page

SUPPLEMENT.....1-7

TABLE OF AUTHORITIES

CASES

Page

NLRB v. McClatchy Newspapers, Inc., No. 90-1062 (D.C. Cir. 1992) All references refer to Slip Op. submitted by Solicitor General with his letter dated 5/18/922.....1-6

International Brotherhood of Electrical Workers, Local No. 111 v. Colorado Ute Electric Ass'n, Inc. and National Labor Relations Board, No. 91-1284 2-6

H. K. Porter Co., Inc. 397 U.S. 99 103-104 (1970)..... 4

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COLORADO-UTE ELECTRIC ASSOCIATION, INC., and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

SUPPLEMENT IN THE NATURE OF REPLY OF RESPONDENT COLORADO UTE TO OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD

Respondent Colorado Ute respectfully files this Supplement in the Nature of Reply* to the Opposition of the National Labor Relations Board in Opposition, in view of the Decision of the D. C. Circuit in NLRB v. McClatchy Newspapers, Inc., No. 90-1062, decided by the DC Circuit on May 15, 1992 submitted by the Solicitor General to the Court by letter of May 18, 1992.

Respondent is compelled to file this Supplement in the

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* Consistent with Respondent's alternative position, See page 12 of Res. Brf in Op.

Nature of Reply in view of the Decision of the D. C. Circuit in McClatchy taken together with the Solicitor General's position that the Court not accept the Union's Petition as it was premature, and by virtue of the fact that the same issue was pending before the DC Circuit in McClatchy.

After reading the DC Circuit's Per Curiam Decision and three separate Opinions in McClatchy, Respondent respectfully urges the Court to accept the case for review and to affirm the Decision below, as the questions presented are of major importance and at root in every collective bargaining negotiation in the country.

The Board continues to follow its erroneous position in Colorado Ute, as evidenced by its Decision in McClatchy. This adversely affects the day to day ability of employers to make decisions in collective bargaining once impasse is reached on a mandatory subject of bargaining, i.e, whether or not it will or not be an unfair labor practice to implement the employer's final offer.

The persuasive Opinion of Judge Harry Edwards in McClatchy not only highlights the importance of the Colorado Ute decision, but also highlights why this is such an important issue that should be accepted and affirmed by the Court at this time. The Per Curiam Opinion in McClatchy, holds that the decision of the Board:

> "does not constitute reasoned decision making under past Board and court interpretations of the Act." (Slip Op., Pg. 2).

The Board in McClatchy held that:

> "McClatchy violated its duty to bargain when it unilaterally granted merit increases to some employees after reaching a good faith impasse over a discretionary merit pay proposal. In so finding, the Board, followed its decision in Colorado Ute, ..." (Slip Op., pg. 7).

Judge Edwards, while stating that the decision of the Board in McClatchy:

> "...is neither rational nor consistent with the Act." (Slip Op.,pg.8),

and that the

> "Board's so-called waiver theory is a farcical misapplication of the law," (Slip Op.,pg.9),

nevertheless accomplishes a remand and uses his decision as a road map to guide the Board in arriving at a new rationale to affirm its "unrepairable" Colorado Ute Decision.

We respectfully urge this Court, consistent with the Opinion of Judge Henderson, that:

> "after impasse, McClatchy was entitled under established law to implement its proposal and grant its merit increases. Thus in attempting to prevent an implementation, the Board

> impermissibly exerted its power to dictate the substantive terms of the collective bargaining agreement ..." (citing the 10th Circuit's decisions Colorado Ute" and this Court's decision in H. K. Porter Co., Inc., 397 U.S. 99 103-104 (1970) and other cases). (Slip Op. pgs.1-2)
>
> Judge Henderson correctly goes on to state:
>
> "Given the clear precedent supporting the lawfulness of McClatchy's conduct, I find it more than merely difficult to comprehend the Board's judgment in this case, as did Judge Edwards. (citing to Judge Edward's Opinion at 24 of the Slip Opinion), I find it impossible. For this reason, I would refuse to enforce the Board's unsupported (and insupportable) decision and, I hope, lay this issue to rest." (Slip Op., pg. 2).

We similarly ask this court to lay the issue to rest.

The Board's Colorado Ute rationale, which it follows in McClatchy is predicated on its erroneous "waiver theory". Judge Edwards correctly states with regard to the waiver theory, that the Board's position is:

> "...comparing apples and oranges. In none of the cases the Board cites did the employer attempt to bargain about the change before enacting it...(citing cases) The Board has attempted to take the words from decisions involving claims of 'waiver' in situations where an agreement exists and apply them to cases where the parties are bargaining to secure an agreement. It does not work because in the latter situation, the impasse rule comes into play (thus making 'waiver' irrelevant)." (Slip Op., pg. 29)

Judge Edwards correctly concludes at the beginning of his statement that

> "... the Board, in a wholly unconvincing opinion rested on a badly misguided theory of 'waiver', holding that the newspaper was guilty of an unfair labor practice because it had acted without securing a necessary waiver upon the Union's right to bargain with respect to each individual employee's merit increase. (Slip Op., pg.2).

Judge Edward's Opinion in McClatchy highlights why

the important statutory issues under the National Labor Relations Act have been totally misapplied by the Board in Colorado Ute and in McClatchy, and why these issues are of such overriding importance.

It is critical in the implementation of day to day national labor policy that the law of the land reflect the interpretations that the Board and the courts have made permitting an employer to implement his final offer after reaching impasse on a mandatory subject of bargaining. The Board's waiver doctrine, created out of whole cloth, in the context of this case cannot be permitted to stand even for the three years it will take for McClatchy to be decided on review again pursuant to the remand of the D. C. Circuit. We disagree with the Solicitor General's Submission that the issue is not ripe, and by implication, consistent with the D. C. Circuit's Per Curiam holding, the Board should be given another chance.

In Colorado Ute itself, Colorado Ute and the undersigned on behalf of the Council On Labor Law Equality, participated in a rare oral argument before the Board en banc for an entire day. Counsel for the AFL-CIO participated in the oral argument as well. This issue has been fully considered by the Board as few issues have been considered. The Board clearly determined in Colorado Ute to change course. Presently, only the 10th Circuit has had the opportunity to correct the Board's error, but employer's throughout the land are governed and continue to be governed by the Board's Colorado Ute decision, which it continues to follow. We urge this Court to accept Certiorari, and affirm the decision of the 10th Circuit.

Respectfully submitted,

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Dated: May 26, 1992.